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APPELLANT'S BRIEF

COMMONWEALTH OF MASSACHUSETTS
Appeals Court

SUFFOLK, SS A.C. No: 2014-P-1625

GEORGE ALEX,

Defendant-Appellant

v.

BEACON TOWERS CONDOMINIUM TRUST,

Plaintiff-Appellee.

ON APPEAL FROM A JUDGMENT
OF THE SUPERIOR COURT

BRIEF FOR DEFENDANT-APPELLANT GEORGE ALEX

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TABLE OF CONTENTS

Arbitration Awards

AAA Rules

Decisions from Out-of-State Jurisdictions Relied Upon in Appellant's Brief

Statutes

STATEMENT OF THE ISSUES

Did the Superior Court commit reversible error by vacating an arbitration panel's award of attorneys' fees to George Alex on the basis that such award was prohibited by M.G.L. c. 251, § 10, where the parties' arbitration agreement incorporated the Commercial Arbitration Rules of the American Arbitration Association, the panel found that the award of attorneys' fees was "just and equitable" as applied by the Supreme Judicial Court in *Superadio L.P. v. Winstar Radio Productions, LLC*, 446 Mass. 330 (2006), and that the award of attorneys' fees was "authorized by law" under M.G.L. c. 231, § 6F and the common law exception to the American Rule because "substantially all of the defenses [asserted by the Board of Trustees for the Beacon Towers Condominium Trust] were wholly insubstantial, frivolous and not advanced in good faith" and the Trustees "refused to recognize [Mr. Alex's] clear rights [] and forced him to incur the expense of this arbitration knowing that they had no defense to his []claim"?

STATEMENT OF THE CASE

I. Nature of the Case

This appeal arises out of a dispute between the

Appellant, George Alex, a unit owner of the Beacon Towers Condominium (the "Condominium"), and the Appellee Board of Trustees for the Beacon Towers Condominium Trust (the "Trustees") concerning the validity of a special common expense assessment for the uninsured costs of completing the restoration and improvement of the Condominium building located at 483 Beacon Street (the "Special Assessment"). [Addendum (hereinafter "Add.") 13-14].

In September 2010, the Trustees commenced the restoration and improvement of 483 Beacon Street, which sustained significant casualty losses from a large fire, without obtaining the approval of the Unit Owners of the Condominium. [Add. 19 - 21]. Mr. Alex, who owned one unit in 479 Beacon Street and a second unit in 481 Beacon Street, timely dissented from the Trustees' failure to obtain approval of their restoration and improvement plan. [Add. 25]. The Trustees nevertheless persisted in their refusal to obtain the assent of the majority of the Unit Owners to the proposed restoration and improvement plan, and issued a Special Assessment of $2.15 million to all Unit Owners, including Mr. Alex, to pay for the uninsured costs of restoring and improving 483 Beacon

Street. [Add. 25 - 28].

Mr. Alex commenced an arbitration of the dispute before a panel of three arbitrators (the "Arbitrators"), which was chaired by a retired justice of the Superior Court and administered by JAMS under the auspices of the American Arbitration Association as required by the Declaration of Trust. [Add. 14]. The arbitration resulted in an award in favor of Mr. Alex which included a declaration that the Special Assessment was invalid due to the Trustees' failure to obtain the approval from the Unit Owners of the restoration plan for the Condominium as required by the casualty loss provisions of M.G.L. c. 183A, § 17. [Add. 37]. Accordingly, the Arbitrators decreed that Mr. Alex need not pay any further amounts towards the Special Assessment, and ordered that the Trustees provide restitution of the amounts paid by Mr. Alex towards the Special Assessment. [Add. 37]. The Arbitrators also awarded Mr. Alex with his attorneys' fees incurred in prosecuting the Arbitration Action in the amount of $48,750, pursuant to AAA Commercial Arbitration Rule 43(d)(ii), reasoning that such an award was authorized by M.G.L. c. 231, § 6F, because the Trustees "refused to recognize [Mr. Alex's] clear

rights under G.L. c. 183A, § 17 and forced him to incur the expense of this arbitration knowing that they had no defense to his Section 17 claim" and "substantially all of the defenses [asserted by the Trustees] were wholly insubstantial, frivolous and not advanced in good faith." [Add. 38 - 39, 43 - 44]. The arbitration panel entered their Final Award in favor of Mr. Alex on October 16, 2013. [Add. 42 - 45].

In November 2013, the Trustees commenced a civil action in the Suffolk Superior Court, Civ. No. 2013-04045, to vacate the Arbitrators' award of restitution and attorneys' fees to Mr. Alex. [Record Appendix (hereinafter "R.A.") 1, 5]. In June 2014, the Superior Court issued a decision and order on the Trustees' motion to vacate the arbitration award which confirmed the award of restitution to Mr. Alex, but vacated the Arbitrators' award of attorneys' fees to Mr. Alex.[Add. 1-11, R.A. 3, 199]. Final judgment in accordance with the memorandum of decision on the Trustees' motion to vacate was entered in the Superior Court pursuant to Mass.R.Civ.P. 58(a) on July 15, 2014. [Add. 12; R.A. 4, 210].

On July 21, 2014, Mr. Alex timely appealed from the final judgment of the Superior Court insofar as

said judgment vacates the arbitration award of attorneys' fees to Mr. Alex. [R.A. 211].

II. Statement of Facts

1. Factual Background

In 1982, the Beacon Towers Condominium (the "Condominium") was created pursuant to G.L. c. 183A. [Add. 15]. The Beacon Towers Condominium Trust is the Organization of Unit Owners for the Condominium. [Add. 15]. The Board of Trustees for the Beacon Towers Condominium Trust (the "Trustees") is a group of individuals who are responsible for the operating, maintaining, and managing the common elements for the Condominium. [Add. 15 - 16].

The condominium units that comprise the Condominium are located in three adjacent buildings, including a 10 story building with 69 units located at 483 Beacon Street, and two garden-style condominium buildings with a total of 16 units located at 479 - 481 Beacon Street, Boston, Massachusetts. [Add. 16]. George Alex was the owner of two condominium units located at 479 and 481 Beacon Street subject to the terms and conditions of the Declaration of Trust for the Beacon Towers Condominium Trust. [Add. 15].

On April 7, 2010, there was a nine-alarm

electrical fire in 483 Beacon Street which caused substantial damage throughout the building rendering it uninhabitable. [Add. 18]. Approximately 100 residents had to vacate 483 Beacon Street and could not return until the building was restored and an occupancy permit issued in September 2011. [Add. 18]. The other two buildings located at 479 and 481 Beacon Street were not affected by the fire. [Add. 18].

Within 120 days of the fire, the Trustees were obligated to certify whether or not the damage is in excess of 10 percent of the value of the Condominium pursuant to G. L. c. 183A, § 17. [Add. 18]. The value of the Condominium immediately prior to the fire was approximately $31 - $33 million. [Add. 22 - 32]. The Trustees commenced the restoration and improvement of 483 Beacon Street in May 2010. [Add. 18]. By August 6, 2010, the Trustees knew or should have known that the costs of restoring 483 Beacon Street would be in excess of $7 million, which is well in excess of 10% of the value of the Condominium. [Add. 19].

In February 2011, George Alex, who believed that the Trustees' restoration and improvement plan was unfair due to the fact that he received no benefit from the upgrades to 483 Beacon Street, timely

dissented from the Trustees' decision to proceed with their plan for the restoration and improvement of 483 Beacon Street based upon the Trustees' failure to comply with the requirements of Section 17 of M.G.L. c. 183A and Section 5.5.1 of the Declaration of Trust, among other things. [Add. 25]. The Trustees refused to hold their restoration and improvement plan to a vote of the Unit Owners and completed the process of restoring and improving 483 Beacon Street by September 2011. [Add. 25 - 27]. The Trustees completed the restoration of 483 Beacon Street without certifying whether or not the damage to the Condominium was in excess of 10 percent of the value of the Condominium and without obtaining the approval of the Unit Owners, notwithstanding that they were obligated by the provisions of the Condominium Act and the Declaration of Trust to do so because the amount of the casualty loss was far in excess of 10% of the value of the Condominium. [Add. 31-33]. In fact, the Trustees refused to take a vote from the Unit Owners regarding the Trustees' plan of restoration because they knew that they would not be able to obtain the requisite approval from the Unit Owners. [Add. 18, 21, 22].

On November 10, 2011, the Trustees levied a

Special Assessment on the Unit Owners because the insurance proceeds from the Condominium's master policy were insufficient to pay for the costs of restoring and improving 483 Beacon Street in the manner determined by the Trustees. [Add. 27 - 28]. The Trustees assessed Mr. Alex in the amount of $30,143 for Unit No. 11 of 479 Beacon Street and the sum of $32,852 for Unit No. 14 of 481 Beacon Street, for a total assessment of $62,995. [Add. 27]. Under protest, Mr. Alex elected to pay the assessments for his two units on a payment plan requiring him to pay the sum of $325.19 for Unit No. 11 in 479 Beacon Street and $354.42 for Unit No. 14 in 481 Beacon Street on the first of every month. [Add. 27 - 28].

2. The Arbitration Action

Mr. Alex commenced an arbitration action, pursuant to Section 5.5.3 of the Declaration of Trust, to challenge the propriety of the Trustees' conduct and the validity of the Special Assessment. [Add. 13 - 14]. Specifically, Mr. Alex claimed that the Trustees failed to comply with the casualty loss provisions of Section 17 of M.G.L. c. 183A and Section 5.5.1 of the Declaration of Trust, among other things. [Add. 29 - 31]. Believing that the Special Assessment was both

illegal due to the Trustees' failure to comply with the casualty loss and improvement provisions of the Condominium Act and the Declaration of Trust and unfair since he derived no benefit from any of the repairs or improvements to 483 Beacon Street,[1] Mr. Alex sought a declaration that the Special Assessment imposed on him was unlawful, restitution of amounts paid by him towards the Special Assessment, and attorneys' fees incurred in the arbitration due to the Trustees' bad faith. [Add. 21 - 27].

The Arbitration Action proceeded before a panel of three arbitrators (the "Arbitrators") including a neutral, Hon. Patrick J. King (ret.) and was administered by JAMS (Case No. 1400013838). [Add. 14]. The hearing in the Arbitration Action occurred before the Arbitrators over the course of two full days on June 3, 2013 and June 4, 2013, whereby the Arbitrators received testimonial evidence from various witnesses

[1] *See Blood v. Edgars, Inc.*, 36 Mass.App.Ct. 402, 407 (1994)(There is a "compelling inequity of condominium unit owners being held liable for illegal or unauthorized common expense assessments"); *Tosney v. Chelmsford Village Condominium Association*, 397 Mass. 683 (1986) ("[i]t does not seem either equitable or logical that townhouse unit owners should be required to pay a portion of the expenses for facilities from which they receive no benefit").

and documentary evidence submitted by the parties. [Add. 14].

On August 12, 2013, the Arbitrators entered the Interim Award in favor of George Alex and against the Trustees. [Add. 40]. In the Interim Award, the Arbitrators found that the amount of the casualty loss to the Condominium was greater than 10% of the value of the Condominium immediately prior to the fire, and the Trustees failed to obtain the approval from the majority of the beneficial interest of the Organization of Unit Owners to proceed with the restoration of the Condominium as required by the provisions of M.G.L. c. 183A, § 17 and Article 5.5.1 of the Condominium's Declaration of Trust. [Add. 31 - 33]. Based upon the extensive factual findings and conclusions of law, the Arbitrators declared in the Interim Award that: (a) the Special Assessment is void due to the failure by the Trustees to comply with the procedures mandated by the casualty loss provisions set forth in Section 17 of M.G.L. c. 183A and Section 5.5.1 of the Declaration of Trust and that George Alex therefore is not responsible for making any further payments towards the Special Assessment; (b) George Alex is entitled to restitution of all amounts paid by

him towards the Special Assessment; and, (c) in the event a special assessment is needed to satisfy the Final Award in the Arbitration Action, George Alex should not be included in that special assessment. [Add. 37 - 38].

The Interim Award also included an express finding that the Trustees acted in bad faith. [Add. 39]. Specifically, the Arbitrators found that:

- the Trustees proceeded with their unilaterally determined plan to restore 483 Beacon Street after the fire while ignoring their obligations under M.G.L. c. 183A, § 17 and Declaration of Trust, § 5.5.1, notwithstanding that one of the unit owners, who is an attorney, advised the Trustees of such obligations and that the Trustees probably knew that the amount of the loss exceeded 10% of the value of the Condominium [Add. 18, 21, 26];
- the Trustees did not obtain an opinion from counsel advising them that they were not required to put the restoration plan to a vote [Add. 22];
- William Deacon, the head Trustee, conceded

during his examination at the hearing that the Trustees intentionally did not hold a vote of the Unit Owners as to the Trustees' proposed restoration plan because they knew that they would not get the requisite approval from the Unit Owners to do so [Add. 22];

- Mr. Deacon's testimony regarding the Trustees' determination of the value of the Condominium was not credible and "appears to have been pulled out of thin air" [Add. 22];
- the first document supporting the Trustees' claim that the amount of the loss was less than 10% of the value of the Condominium was generated by a witness, who was hired by the Trustees, just three days prior to the arbitration hearing [Add. 22];
- Mr. Deacon's testimony that the Trustees had made the required casualty loss determination was inconsistent with a prior correspondence that had been sent by the Trustees to the Unit Owners which indicated that no such determination had been made [Add. 23];
- The Trustees presented the results of an opinion poll to the Unit Owners concerning the

option as to whether to repair or replace the heating system in which they presented only the results of the ballot from the Unit Owners in 483 Beacon Street, while ignoring the ballots from the Unit Owners in 479 and 481 Beacon Street [Add. 23];

- The Trustees falsely represented to the Unit Owners that the results of the opinion poll did not reflect the sentiments of the majority of the Unit Owners on the purported grounds that only a few Unit Owners responded to the opinion poll when, in fact, 74% of the Unit Owners had responded to the opinion poll and the majority of those Unit Owners who did respond voted against the replacement of the heating system in 483 Beacon Street [Add. 26];
- Although various owners, including George Alex, dissented from the Trustees' determination concerning the replacement of the hearing system in 483 Beacon Street, the Trustees refused to revisit their determination claiming that they were not required to obtain the Unit Owners' approval [Add. 24 - 27];
- The Trustees replaced the heating system in 483

Beacon Street, but did not do so in 479-481 Beacon Street [Add. 24]; and,

- The Trustees executed a certificate under the pains and penalties of perjury as required by the Condominium Act relative to the procurement of financing for the uninsured costs of completing the restoration and improvement of 483 Beacon Street in which the Trustees represented that their execution of the loan documents do not conflict with any law or governing document of the Condominium, even though the Trustees knew that their actions were not in compliance with M.G.L. c. 183A, § 17 and Declaration of Trust, § 5.5.1 [Add. 27].

Based upon these findings, the Arbitrators concluded that "substantially all of the defenses [asserted by the Trustees] were wholly insubstantial, frivolous and not advanced in good faith" and that the Trustees "refused to recognize [George Alex's] clear rights under G.L. c. 183A, § 17 and forced him to incur the expense of this arbitration knowing that they had no

defense to his Section 17 claim." [Add. 39].[2]

As authority for the award of arbitration attorneys' fees to Mr. Alex, the Arbitrators relied on AAA Commercial Arbitration Rule 43(d)(ii), observing that Rule 43(d)(ii) provides for the award of attorneys' fees where "authorized by law." [Add. 38]. The Arbitrators ruled that the award of attorneys' fees was authorized by Massachusetts law because M.G.L. c. 231, § 6F permits an award of attorneys' fees where "substantially all of the defenses . . . were wholly insubstantial, frivolous and not advanced in good faith." [Add. 39]. While the Arbitrators recognized that Section 6F "governs civil actions in Massachusetts courts," the Arbitrators ruled that "for purposes of our authority under AAA Rule 43(d)(ii), Massachusetts law recognizes the availability of

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[2] The potential for abuse by the trustees of a condominium trust of the unit owners was recently highlighted in the decision of *Wodinsky v. Kettenbach*, 86 Mass. App. Ct. 825, 2015 Mass. App. LEXIS 4 (Mass. App. Ct. Jan. 6, 2015) wherein the Appeals Court affirmed a $1.85 million verdict in favor of the plaintiffs for violation of the Civil Rights Act, abuse of process, and civil conspiracy, arising out of allegations that the trustees replaced the elevator, roof, heating system, and electrical systems of a condominium building, instead of repairing those facilities and structures, and thereafter assessed the plaintiffs with their portion of a purported $1 million assessment, even though the assessment was not authorized by the board of trustees.

attorneys' fees on the facts of this case where the majority of the panel finds that "substantially all of the defenses [asserted by the Trustees] were wholly insubstantial, frivolous and not advanced in good faith." [Add. 39]. Accordingly, the Arbitrators ordered Mr. Alex to file a motion for attorneys' fees and costs for the purpose of assessing the amount of the award to be entered in his favor. [Add. 40].

On October 16, 2013, after considering the briefs submitted by George Alex and the Trustees in connection with the claimant's motion for attorneys' fees, the Arbitrators entered a final award in favor of Mr. Alex (the "Final Award"). [Add. 42 - 46]. The Final Award confirmed the Arbitrators' decree that the Special Assessment was null and void and that Mr. Alex shall have no further liability for the payment of the balance of his portion of the Special Assessment for his two units. [Add. 43]. The Arbitrators finally awarded Mr. Alex a total of $113,753.13, which consisted of $37,504.78 in restitution for the amounts paid towards the Special Assessment, prejudgment interest at the rate of 4% in the amount of $628.14, attorneys' fees incurred in prosecuting the Arbitration Action in the amount of $48,750, and costs

incurred in paying for the time spent by two arbitrators and an expert in the amount of $26,870.21, against Jennifer J. Lau, William Deacon, James Kaspryk, Gary Moss and Robert Tierney, in their capacity as Trustees of the Beacon Towers Condominium Trust. [Add. 44 - 45]. The Final Award also indicates that post-judgment interest would accrue at the rate of 12% per annum commencing 30 days from the date of the Final Award. [Add. 45].

3. The Superior Court Action

On November 14, 2013, the Trustees commenced an action in the Suffolk Superior Court, Civ. No. 2013-04045 (the "Superior Court Action"), by the filing of an Application seeking to vacate the Arbitrators' Final Award in favor of Mr. Alex. [R.A. 3, 5]. The Trustees contended in their Motion to Vacate the Arbitration Award that the Arbitrators exceeded its authority by awarding Mr. Alex restitution of the amounts paid by him towards the Special Assessment and attorneys' fees incurred in prosecuting the Arbitration Action on the basis that such relief is not authorized by the parties' arbitration agreement and is contrary to the provisions of M.G.L. c. 183A, §

17 and G.L. c. 251, § 10. [R.A. 8 - 9].

Mr. Alex opposed the Trustees' Motion to Vacate and filed a Motion to Confirm the Arbitration Award. [R.A. 150 - 172]. In his motion papers, Mr. Alex contended that the arbitration award of attorneys' fees was not prohibited by M.G.L. c. 251, § 10 and therefore should not be vacated because the Arbitrators ruled that the parties' agreement authorized them to "grant *any* remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties," and the award of attorneys' fees was "just and equitable" in accordance with the decision of the Supreme Judicial Court in *Superadio Ltd. P'ship v. Winstar Radio Prods.*, LLC, 446 Mass. 330, 337 (2006). [R.A. 164 - 167]. In addition, Mr. Alex argued that the Arbitrators correctly ruled that they had authority to award of attorneys' fees on the grounds that they were "authorized by law" under M.G.L. c. 231, § 6F and the common law bad faith exception to the American Rule. [R.A. 167 - 171].

On June 12, 2014, Hon. Judge Frances A. McIntyre of the Superior Court issued a decision and order on the Trustees' Motion to Vacate the Arbitration Award.

[Add. 1 - 11; R.A. 3, 199]. In the decision, the Superior Court confirmed the award of restitution to Mr. Alex, but vacated the Arbitrators' award of attorneys' fees to him. [Add. 1]. In vacating the award of attorneys' fees to Mr. Alex, the court reasoned that M.G.L. c. 251, § 10 prohibits the award of attorneys' fees incurred in arbitration in the absence of an express agreement of the parties authorizing such an award, that there was no such express agreement of the parties, and that the Arbitrators erroneously relied on *Superadio Ltd. P'ship v. Winstar Radio Prods.*, LLC, 446 Mass. 330, 337 (2006) and M.G.L. c. 231, § 6F in granting attorneys' fees to Mr. Alex. [Add. 9 - 10]. Final judgment was entered in the Superior Court Action pursuant to Mass.R.Civ.P. 58(a) on July 15, 2014. [Add. 12; R.A. 4, 210].

ARGUMENT

I. Summary of Argument

The Superior Court committed reversible error insofar as the final judgment vacates the arbitration award of attorneys' fees to Mr. Alex because such award was not prohibited by M.G.L. c. 251, § 10. [Appellant's Brief ("A.B.") 24]. Section 10 of Chapter

251 of the General Laws does not preclude an arbitrator's award of attorneys' fees where the parties "otherwise agree" to confer authority on the arbitrator to render such an award. [A.B. 24].

While the Appellate Courts of Massachusetts have not addressed the precise question presently before this Court [A.B. 25], there is persuasive authority from the Superior Court and courts in other jurisdictions that parties "otherwise agree" to provide authority to an arbitrator to award attorneys' fees where, as here, the parties incorporate into their arbitration agreement the AAA's Commercial Arbitration Rules, which provides under Rule 43 that an arbitrator may award any relief deemed "just and equitable" and within the scope of the agreement of the parties and may award attorneys' fees where, among other things, such award is "authorized by law." [A.B. 28]. The Arbitrators found that the award of attorneys' fees to Mr. Alex was "just and equitable" and within the scope of the agreement of the parties, like the Supreme Judicial Court did in *Superadio Ltd. P'ship v. Winstar Radio Prods.*, LLC, 446 Mass. 330 (2006), because the Trustees forced Mr. Alex to arbitrate his claims even though the Trustees had no

defenses to his claims. [A.B. 34]. The Arbitrators further found that the award of attorneys' fees to Mr. Alex was authorized by Massachusetts substantive law under M.G.L. c. 231, § 6F because "substantially all of the defenses [asserted by the Trustees] were wholly insubstantial, frivolous and not advanced in good faith." [A.B. 39].

The Superior Court had no power to disturb the Arbitrators' ruling that the award of fees was authorized under *Superadio* and Section 6F of Chapter 231 because a court may not reverse an arbitrators' award on account of a purported error of law. [A.B. 36, 40]. In addition, the Arbitrators properly relied on Section 6F as grounds for the ruling that the award of fees was authorized by law because the common law permits an arbitrator to award attorneys' fees for bad faith as an exception to the American Rule [A.B. 40], the enactment of Section 6F did not displace the common law remedy [A.B. 45], and an arbitrator may award any relief that a court could award under the circumstances [A.B. 45]. For these reasons, the Superior Court's judgment vacating the arbitration award of attorneys' fees to Mr. Alex on the grounds that it was prohibited by M.G.L. c. 251, § 10 is

erroneous and must therefore be reversed on appeal. [A.B. 49].

II. Standard of Review

The standard of review of arbitration awards is well established. "A matter submitted to arbitration is subject to a very narrow scope of review." *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007 (1990). Vacation of arbitration awards is limited by statute to the factors set forth in G. L. c. 251, § 12. The merits of an arbitral award are not revisited on appeal. *Sheriff of Suffolk County v. AFSCME Council 93, Local 419*, 67 Mass. App. Ct. 702 , 705 (2006), citing *School Dist. of Beverly v. Geller*, 435 Mass. 223, 228 (2001). A court may not vacate an arbitral award based upon equitable considerations, fairness, or the wisdom of the decision. *See Massachusetts Highway Dept. v. Perini Corp*, 79 Mass. App. 430 (2011); *Massachusetts Hy. Dept. v. American Fedn. of State, City & Mun. Employees*, 420 Mass. 13, 16 (1995). In essence, courts inquire into arbitration decisions "only to determine if the arbitrator exceeded the scope of his authority, or decided the matter based on 'fraud, arbitrary conduct, or procedural irregularity in the hearings.'

" *Marino v. Tagaris*, 395 Mass. 397 , 400 (1985). Absent fraud, corruption, or other undue means, errors of law or fact are not sufficient grounds to set aside an arbitration award. *Superadio Ltd. P'ship v. Winstar Radio Prods.*, LLC, 446 Mass. 330, 337 (2006); *Mass. High-way Dep't v. AFSCME*, 420 Mass. 13, 15 (1995).

However, "arbitration, it is clear, may not 'award relief of a nature . . . which directs or requires a result contrary to express statutory provision' . . . or otherwise transcends the limits of the contract of which the agreement to arbitrate is but a part." *Lawrence v. Falzarano*, 380 Mass. 18 , 28 (1980). Thus, "an arbitrator exceeds his authority by granting relief beyond the scope of the arbitration agreement . . . by awarding relief beyond that to which the parties bound themselves . . . or by awarding relief prohibited by law" (citations omitted). *Lynn v. Lynn Police Assn.*, 455 Mass. 590, 596 (2010), quoting from *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007 (1990).

III. The Superior Court Should Have Confirmed the Arbitrators' Award of Attorneys' Fees to Mr. Alex Because Section 10 of the Massachusetts Arbitration Act Does Not Prohibit the Award of Attorneys' Fees Where the Parties' Arbitration Agreement Incorporates the AAA's Commercial Arbitration Rules and An Award of Fees is Authorized Under Rule 43 of Those Rules.

Section 10 of M.G.L. c. 251 provides that "*unless otherwise agreed*, the arbitrators' expenses and fees, together with other expenses, *not* including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award … " (emphasis supplied). [Add. 104]. While it is true that M.G.L. c. 251, § 10 generally prohibits the award of attorneys' fees by an arbitrator, *Floors, Inc. v. B.G. Danis of New England, Inc.*, 380 Mass. 91, 92 (1980), such an award is not prohibited where, as here, the parties otherwise provide for an award of counsel fees in their agreement to arbitrate.

1. The Appellate Courts of Massachusetts Have Not Addressed Whether an Arbitrator May Award Attorneys' Fees under the AAA Rules.

Neither the Supreme Judicial Court nor the Appeals Court of Massachusetts has addressed the precise question as to whether parties "otherwise agree" to provide an arbitrator with authority to award attorneys' fees by virtue of the incorporation

of the AAA Commercial Arbitration Rules into their agreement to arbitrate. In *Floors, Inc. v. B.G. Danis of New England, Inc.*, 380 Mass. 91, 92 (1980), the Supreme Judicial Court held that a subcontractor was not entitled to attorney's fees under G. L. c. 149, § 29, the public works payment bond statute, for legal services rendered during arbitration of the underlying contract claim. *Floors, Inc.*, 380 Mass. at 95-101. The court reasoned that "[l]egal fees incurred while arbitrating [the underlying dispute] are simply not the direct result of the right of action created by [G. L.] c. 149, § 29," which mandates an award of legal fees to a subcontractor who recovers judgment in an action on a surety bond. *Id.* at 99-100. G. L. c. 251, § 10 prohibited an award of attorney's fees because there was nothing in the language or legislative history of G. L. c. 149, § 29 indicating an intent to override the presumption against the award of attorneys' fees found in G. L. c. 251, § 10. *Id.* at 97, 101. *Floors* involved arbitration under the AAA's Construction Industry Arbitration Rules, and there is no discussion in the decision as to whether the Construction Industry Arbitration Rules authorized attorneys' fees under any circumstances. *Floors, Inc.*,

380 Mass. at fn. 2 and 96-101.

Like *Floors*, none of the other decisions issued by the Supreme Judicial Court or Appeals Court address the precise question in this case: whether the parties' agreement to arbitrate authorizes the Arbitrators to award attorneys' fees by virtue of the parties' incorporation of the AAA Commercial Arbitration Rules. In *Drywall Sys., Inc. v. ZVI Constr. Co.*, 435 Mass. 664 (2002), the SJC revisited the question in *Floors* as to whether a claim for attorneys' fees under a statute (M.G.L. c. 93A) overrode the general prohibition of attorneys' fees in G. L. c. 251, § 10 and held that it did. The Appeals Court's decision in *Baxter Health Care Corp. v. Harvard Apparatus, Inc.*, 35 Mass. App. Ct. 204, 208 (1993) involved the question as to whether an arbitrator may award attorneys' fees to a prevailing party where there was nothing in the parties' agreement which authorized such an award. *Softkey, Inc. v. Useful Software, Inc.*, 52 Mass. App. Ct. 837, 839-40 (2001) was a response to *Baxter* in the sense that arbitration attorneys' fees were authorized under an express contractual provision in the arbitration agreement providing for an award of attorneys' fees.

LaRoche v. Flynn, 55 Mass.App.Ct. 419 (2002) involved the question as to whether a superior court judge had authority under Mass.R.Civ.P. 37 to award attorneys' fees incurred in an arbitration proceeding as part of a judgment confirming the arbitration award. None of these decisions from the SJC or Appeals Court involved any discussion as to whether an arbitrator has authority to award attorneys' fees under Rule 43 of AAA's Commercial Arbitration Rules. Moreover, none of those decisions involved circumstances where, as here, the arbitral award of attorneys' fees was based upon a finding that one of the parties acted in bad faith.

2. The Superior Court Ignored Persuasive Authority Standing for the Proposition that Section 10 of the Massachusetts Arbitration Act Does Not Prohibit the Award of Attorneys' Fees Where the Parties' Arbitration Agreement Incorporates the AAA's Rules and An Award of Fees is Authorized Under Rule 43 of Those Rules.

While the Appellate Courts of Massachusetts have not ruled on this precise issue, there is persuasive authority from the Superior Court and courts in other jurisdictions for the proposition that parties to an arbitration "otherwise agree" that the arbitrator may award attorneys' fees where the arbitration agreement incorporates the AAA Commercial Arbitration Rules and

those rules permit an award of attorneys' fees under the circumstances of the case. [Add. 71 - 103].

The parties to this dispute made the AAA's Commercial Arbitration Rules, which were amended effective January 1, 2009 [Add. 47 - 70], a part of their agreement to arbitrate. The arbitration clause in Section 5.5.3 of the Declaration of Trust states that the parties would submit to arbitration any "disputes" concerning "determinations" or "actions" of the Trustees under Section 5.5 and that such arbitration would be conducted under the rules of the American Arbitration Association. [Add. 24 - 25; R.A. 41 - 42]. Mr. Alex initially filed his demand for arbitration in or around April 2011. [Add. 13, 26].[3] Accordingly, the parties made the AAA's Commercial Arbitration Rules, which were amended and effective June 1, 2009, a part of their agreement to arbitrate. *See* AAA Commercial Arbitration Rule R-1(a)("the parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have

[3] Although the Interim Award of the Arbitrators states on page 1 [Add. 13] that Mr. Alex "commenced this arbitration in April 2010, the Arbitrators intended to state "April 2011." Page 14 of the Interim Award [Add. 26] acknowledges that it was not until "after the February 28, 2011 letter" from the Trustees that Mr. Alex decided to file a demand for arbitration.

provided for arbitration by the American Arbitration Association under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form obtained at the time the demand for arbitration or submission agreement is received by the AAA. . .") [Add. 52]; *Heartland Premier, Ltd. v. Group B and B, L.L.C.*, 31 P.3d 978, 981, 2001 Kan. App. LEXIS 870, 6-7 (Kan. App. 2001) ("Group B made its demand for arbitration in March 1999. Based on the clear language of the 1998 AAA Commercial Arbitration Rules, specifically Rule 1, any amendment of the 1998 rules that was in effect in March 1999 would apply to the arbitration.")[Add. 73 - 74].[4]

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[4] Other courts similarly rule that the AAA Commercial Arbitration Rules become part of the parties' agreement to arbitrate when that agreement states that the parties shall arbitrate under the rules of the AAA. *See e.g. Winslow v. D.R. Horton America's Builder*, No. 04-12-00376-CV, (Tex. Ct. App. 4th Dist. May 29, 2013) (ruling that the arbitration of the parties' dispute was governed by the AAA's Commercial Arbitration Rules where contract provided for the arbitration to "be administered and conducted by the American Arbitration Association ("AAA") in accordance with . . . THE RULES OF THE AAA")(citing AAA Commercial Arbitration Rule R-1(a)); *Terminix Intern. Co., LP v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327, 1332-33 (11th Cir. 2005) ("By incorporating the AAA Rules, including Rule 8, into their agreement, the

The Arbitrators' authority to award remedies, including attorneys' fees, to the parties was derived from the AAA Commercial Arbitration Rules (2009 ed.) because the parties incorporated those rules into their agreement to arbitrate. *See Superadio L.P., supra* at *337* ("The panel's authority derives from the parties' agreement, which contains a broad arbitration provision, and from the AAA rules, which the agreement incorporates and which have a broad remedial provision"). Rule 43 of the 2009 edition of the AAA Commercial Arbitration Rules, entitled "Scope of Award," provides that "(a) the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties . . ." and "(d) the award of the arbitrator(s) may include: ... an award of attorneys' fees if . . . it is authorized by law . . ." [Add. 61]. Thus, the parties entered a "special agreement," removing the circumstances of this case from the general rule prohibiting the award of attorneys' fees in arbitration under M.G.L. c. 251, § 10, to the extent that the Arbitrators deem such award "just and

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parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid.").

equitable" and within the scope of the agreement of the parties or where the Arbitrators rule that such award is "authorized by law," within the meaning of AAA Rule 43. *See Cong. Constr. Co. v. Labonte Drywall*, 1995 Mass. Super. LEXIS 694, 4, 4 Mass. L. Rep. 13 (Mass. Super. Ct. 1995) ("[t]here are three places where we may look to find a special agreement regarding attorneys fees between Labonte and Congress. They are: in the original agreement between the two parties; the two parties' submissions for arbitration; and the American Arbitration Association Rules").

This is the precise reasoning applied by the Kansas Court of Appeals in *Heartland Premier, Ltd. v. Group B and B, L.L.C.*, 29 Kan. App. 2d 777 (Kan. App. 2001) [Add. 71 - 75]. In *Heartland*, the Court of Appeals was confronted with a challenge to an award of attorneys' fees under K.S.A. 5-410,[5] *id.* at 781, a Kansas statute which is very similar to M.G.L. 251, § 10. [Add. 74 - 75]. The Court of Appeals held that the parties' agreement to arbitrate specifically

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[5] The Kansas statute at issue, K.S.A. 5-410, states: "unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, *not including counsel fees*, incurred in the conduct of the arbitration shall be paid as provided in the award." (Emphasis added).

authorized the award of attorneys' fees by virtue of the fact that the agreement incorporated the AAA rules. *Id.* at 780-781 [Add. 73 - 74]. Observing that the AAA rules provided that "the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties" and that "the award of the arbitrator(s) may include: ... an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement," the Court of Appeals concluded that K.S.A. 5-410 did not preclude the award of attorney fees because the parties "otherwise provided" that attorney fees may be included in the arbitrator's award by incorporating the AAA rules into their agreement to arbitrate. *Id.* at 781 [Add. 74 - 75].

Like the Kansas Court of Appeals in *Heartland,* the Tennessee Court of Appeals held that an arbitration award of attorneys' fees was not prohibited Tennessee's version of M.G.L. c. 251, § 10 because the parties incorporated the AAA rules in their agreement to arbitrate and the arbitrator found that the award of attorneys' fees was "authorized by law" in *Rose Construction v. Raintree Development Co.,*

2001 Tenn.App.Lexis 961 (Tenn. Ct. App. Dec. 31, 2001) [Add. 76 - 83]. In *Rose Construction,* the respondent insisted that Section 29-5-13 of the Tennessee Arbitration Code,[6] which is similar to M.G.L. c. 251, § 10 in that it generally prohibits arbitral awards of attorneys' fees, controlled the dispute, as opposed to Tennessee's bad faith statute which permitted an award of attorneys' fees. 2001 Tenn.App.Lexis 961, * 11. [Add. 80]. The Court of Appeals disagreed and upheld the arbitrator's award of attorneys' fees. *Id.* at * 12 [Add. 81]. In doing so, the Court of Appeals reasoned that Section 29-5-13 of the Tennessee Arbitration Code, like M.G.L. c. 251, § 10, did not prohibit the award of attorneys' fees because the parties entered into a special agreement concerning the award of attorneys' fees by incorporating the AAA rule which allowed attorneys' fees where they are "authorized by law." *Id.* at * 13 [Add. 81]. Observing that Tennessee's bad faith statute permitted awards of attorneys' fees for bad faith, the Court of Appeals

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[6] Tenn. Code Ann. § 29-5-311 provides that "[u]nless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award."

held that Section 29-5-13 was no obstacle because arbitrators were authorized by law to impose attorneys' fees as a sanction for the respondent's bad faith. *Id.* at * 15. [Add. 81].

Similarly, in *Winkelman v. Kraft Foods, Inc.*, 2005 WI App 25, 2005 Wisc. App. LEXIS 76 (Wis. Ct. App. 2005), review denied 2005 WI 134, 2005 Wisc. LEXIS 432, the Wisconsin Court of Appeals held that an arbitrator did not exceed her authority by awarding attorneys' fees to the claimant. 2005 WI App 25, P45 [Add. 84]. In so holding, the Court of Appeals reasoned that "her reliance on the arbitration rule granting her the authority to award attorney fees if 'it is authorized by law,' and her reliance on a Wisconsin statute for such authority, were within the scope of the powers these parties agreed to confer on the arbitrator by way of the rules they adopted." *Id.* at P12 [Add. 89].

As in *Heartland, Rose Construction,* and *Winkelman,* the parties "otherwise agreed" that the Arbitrators may award attorneys' fees where such an award is allowed under the AAA Commercial Arbitration Rules (2009). Accordingly, the Superior Court had no power to vacate the Arbitrators' award of attorneys'

fees to Mr. Alex as long as such award was deemed by the Arbitrators to be "just and equitable" and within the scope of the parties' agreement, or that such award was "authorized by law." *See Heartland Premier, Ltd.*, 31 P.3d at 981, 2001 Kan. App. LEXIS 870, * 9 [Add. 75]; *Rose Construction,* 2001 Tenn.App.Lexis 961, * 13 [Add. 81]; *Winkelman*, 693 N.W.2d at 762, 2005 Wisc. App. LEXIS 76, * 11 [Add. 90].

3. The Award of Attorneys' Fees Was Authorized by Rule 43(a) of the AAA's Commercial Arbitration Rules Since Such Award Was Deemed by the Arbitrators to Be "Just and Equitable" and Within the Scope of the Parties' Agreement.

While the decision does not address the precise matter of an arbitrator's authority to award attorneys' fees under the AAA Rules, the SJC has held that an arbitrator was authorized under the AAA Rule that permits awards deemed "just and equitable" to award monetary sanctions for misconduct during discovery in arbitration in *Superadio L.P. v. Winstar Radio Productions, LLC*, 446 Mass. 330 (2006). In *Superadio*, the SJC upheld the award of a monetary discovery sanction finding that such award was authorized by the agreement to arbitrate which incorporated the AAA rules. *Id.* at 338. The SJC

affirmed an arbitrator's award of the discovery sanction, ruling that the Appeals Court (which had ordered the award set aside) had "failed to follow strictly the strong presumption of arbitrability" and "overlooked the essence of the dispute—Superadio's conduct of withholding materials that established Baby Love's damages, namely, the amount of money owed because of Superadio's alleged violation of the agreement. Such a matter, damages owed for breach of the agreement, related to the core of the agreement. As such, the dispute was one encompassed by the terms of the agreement [to arbitrate]." *Id.* at 337-38. The court then gave an extended analysis of the AAA's Commercial Arbitration Rules. It held that the arbitrators' authority to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties" and to "resolve any disputes concerning the exchange of information . . . supported by the broad arbitration provision in the agreement and the absence of any limiting language prohibiting a monetary sanction for discovery violations, authorized the panel to resolve discovery dispute by imposing monetary sanctions." *Id.* at 338-39.

In vacating the award of attorneys' fees to Mr. Alex, the Superior Court erroneously concluded that *Superadio* "has no relevance to the present matter." [Add. 10]. As an initial matter, the Court had no power to vacate the award of attorneys' fees on the basis of its own judgment that *Superadio* was inapplicable. *See Lyons v. School Committee of Dedham*, 440 Mass. 74, 79 (2003) (superior court judge's conclusion that arbitration award offends public policy was erroneous because "the sole reason for his conclusion was his determination that the award clearly ignore[d] the law as stated in *Brophy v. School Comm. of Worcester*, 6 Mass. App. Ct. 731 (1978)," and an error of law is not a permissible basis for vacating an arbitration award). In addition, the Court previously recognized in *North Shore Const. and Development, Inc. v. Lee*, Not Reported in N.E.2d, 2010 Mass. Super. LEXIS 358, 2010 WL 6529645 (Mass. Super. 2010) (Billings, J.),[7] that the holding in *Superadio* is not limited to the question as to whether

[7] The Superior Court did not discuss or even mention its prior decision in *North Shore Const.* in its memorandum of decision on the Trustees' Motion to Vacate the Arbitration Award to Mr. Alex, notwithstanding that such case was discussed in Mr. Alex's brief in support of his Opposition to the Trustees' Motion to Vacate and his Motion to Confirm the Award.

an arbitrator has inherent authority to impose monetary sanctions for a party's failure to cooperate in discovery. In *North Shore Const.*, the Superior Court applied *Superadio* in confirming an arbitrator's award of attorneys' fees against a challenge that they were not authorized by the agreement to arbitrate. The Superior Court observed that the agreement to arbitrate incorporated the AAA Rules which authorized the arbitrator to award any relief deemed just and equitable and within the scope of the agreement of the parties. The court concluded that the "arbitrator's award of attorneys' fees was within his authority to grant any remedy or relief that [he] deem[ed] just and equitable and within the scope of the agreement of the parties" because the award was based on the arbitrator's finding that the respondent had acted in "bad faith," and that the misconduct at issue "related to the core of the agreement to arbitrate since the parties bargained for a private, prompt and inexpensive dispute resolution process, and North Shore (the arbitrator found) wrongly deprived Lee of the benefit of that bargain."

As in *Superadio* and *North Shore Const.*, the Arbitrators' award of attorneys' fees to Mr. Alex was

authorized because the Arbitrators deemed such an award to be just and equitable and within the scope of the agreement of the parties. There is no question that the dispute at issue - whether the Trustees' conduct during the restoration of 483 Beacon Street and this arbitration was in bad faith, vexatious, wanton, or oppressive - is one encompassed by the terms of the agreement to arbitrate. Such matter relates to the core of the agreement which provides for the arbitration of disputes concerning the Trustees' compliance with the provisions of the Condominium Act and the Declaration of Trust governing the rebuilding of a condominium following a casualty loss and the making of improvements to condominium property. *See Superadio*, 446 Mass. at 337-38. In addition, the Arbitrators deemed that the award of attorneys' fees to Mr. Alex was just and equitable because "substantially all of the defenses [asserted by the Trustees] were wholly insubstantial, frivolous and not advanced in good faith" and the Trustees "refused to recognize [George Alex's] clear rights under G.L. c. 183A, § 17 and forced him to incur the expense of this arbitration knowing that they had no defense to his Section 17 claim." Thus, the

Arbitrators were authorized to award attorneys' fees to Mr. Alex because the award was based on the arbitrator's finding that the Trustees acted in "bad faith," and that the misconduct at issue "related to the core of the agreement to arbitrate." *See Superadio*, 446 Mass. at 338-39 and *North Shore Const. and Development, Inc.*, 2010 WL 6529645.

4. The Award of Attorneys' Fees Was Authorized by Rule 43(d) of the AAA Rules Since The Arbitrators' Award of Counsel Fees is "Authorized By Law."

In addition to the Arbitrators' finding that the award of attorneys' fees was just and equitable, the Arbitrators correctly ruled that they had the power to award such fees because the award of counsel fees is "authorized by law" within the meaning of Rule 43 of the AAA Rules. [Add. 38 - 39]. In doing so, the Arbitrators' reasoned that they were authorized by law to award attorneys' fees to Mr. Alex under the bad faith exception to the American Rule codified at M.G.L. c. 231, § 6F. [Add. 39]. The Superior Court had no power to disturb such award even assuming *arguendo* that the Arbitrators erred in their interpretation of the terms "just and equitable" or "authorized by law" within the meaning of Rule 43 of the AAA's Commercial

Arbitration Rules. *See Bernard v. Hemisphere Hotel Management, Inc.*, 16 Mass. App. Ct. 261, 263-264, 450 N.E.2d 1084, 1086, 1983 Mass. App. LEXIS 1380, 5 (Mass. App. Ct. 1983)("[t]he arbitrators' power includes interpretation of arbitration rules, and [e]ven a grossly erroneous decision is binding . . . .") (internal citations and quotations omitted).

a. The Arbitrators Had Inherent Equitable Authority to Award Attorneys' Fees Under the Common Law Bad Faith Exception to the American Rule.

The general rule in Massachusetts, as elsewhere, is that "attorney's fees are not ordinarily recoverable in the absence of statute, court rule, enforceable contract or stipulation providing therefor." *Bournewood Hospital, Inc. v. Massachusetts Commission Against Discrimination*, 371 Mass. 303, 308 (1976). However, "courts of equity, in certain cases under ... [their] general powers, allow counsel fees", *id.* at 312. Under a court's broad equitable powers, it "may award attorney's fees in favor of one party and against another, where an unfounded action or defense is brought or maintained in bad faith, vexatiously, wantonly, or for oppressive reasons." *See Miaskiewicz v. LeTourneau*, 12 Mass.App.Ct. 880, 881 (1981)

(rescript); M.G.L. c. 231, § 6F. An award of counsel fees is also appropriate under a court's equitable powers in the interests of justice where the litigant's conduct is unreasonably obdurate or obstinate, or where it should have been unnecessary for a successful litigant to have brought the action. *Police Com'r of Boston v. Gows*, 429 Mass. 14, 18 (1999). *See also Skehan v. Bd. of Trs. of Bloomsburg State Coll.*, 538 F.2d 53, 57 (3d Cir. 1976) ("[T]here is a[n] . . . exception to the American rule, which allows the recovery of fees as an element of damages for pre-litigation vexation or oppression in resisting a just claim"); *Bradley v. Sch. Bd.*, 345 F.2d 310 (4th Cir.1965)(fee shifting allowed because the "action should have been unnecessary and was compelled by the [party's] unreasonable, obdurate obstinacy").

The courts have repeatedly recognized that an arbitrator has inherent power to sanction a party for bad faith conduct. In *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1064 (9th Cir. 1991), the Ninth Circuit Court of Appeals held that in light of accepted "bad faith conduct" exception to the American Rule, it was within the power of the arbitration panel to award attorneys' fees. The Eleventh Circuit

affirmed an arbitral award of attorneys' fees in *Marshall & Co., Inc. v. Duke*, 114 F.3d 188 (11th Cir. 1997) cert. denied 522 U.S. 1112 (1998), holding that "every judicial and quasi-judicial body has the right to award attorneys' fees under the common law bad faith exception to the 'American Rule.'" In *Reliastar Life Ins. Co. of New York v. EMC Nat'l Life Ins. Co.*, No. 07-0828, ___ F.3d ___, 2009 WL 941173 (2nd Cir. 2009), the Second Circuit Court of Appeals affirmed a $3.8 million award of attorney fees as a sanction for bad faith in an arbitration even though the written agreement provided that each party "shall bear the expense of its…[own]… attorney's fees," reasoning that a "broad arbitration clause . . . confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith . . .").

Decisions from many other courts are in accord. *See Bacardi Corp. v. Congreso de Uniones Industriales de Puerto Rico,* 692 F.2d 210, 214 (implicitly recognizing that arbitrators may award attorneys' fees for bad faith); *In re Northwestern Nat'l Ins. Co.*, 2000 WL 702996, *1 (S.D.N.Y. May 30, 2000) (noting that arbitrators "have a general power to award attorneys fees absent a specific prohibition");

Langemeier v. Kuehl, 40 P.3d 343, 346 (Mont. 2001) ("an arbitrator may, under limited circumstances, award attorney's fees through his equity powers where bad faith or malicious behavior is involved"); *Town of Fond du Lac v. City of Fond du Lac*, 463 N.W.2d 880 (Wis. Ct. App. 1990) (attorney's fees award stemmed "from the city's conduct prior to the arbitration process, when the city engaged in bad faith and dilatory tactics which resulted in increased costs to the town"); *Terrace Group v. Vermont Castings, Inc.*, 753 A.2d 350, 351 (R.I. 2000) (applying Vermont law, which the court said was similar to Rhode Island law, and upholding arbitrator's award of attorneys' fees based upon bad faith).

In short, it is well-established that arbitrators have inherent equitable authority under the common law to award attorneys' fees for bad faith. The Arbitrators' award of attorneys' fees to Mr. Alex was "authorized by law" under the common law exception to the American Rule conferring authority on arbitrators to award attorneys' fees for bad faith.

b. <u>The Arbitrators Had Authority Under M.G.L. c. 231, § 6F to Award Attorneys' Fees Due to the Trustees' Bad Faith.</u>

The Superior Court erred by concluding that the

Arbitrators did not have authority to award attorneys' fees for bad faith on the basis that M.G.L. c. 231, § 6F only applies to courts, not arbitrators. [Add. 10]. This reasoning is flawed for three reasons. As an initial matter, the Superior Court had no power to vacate the arbitral award of attorneys' fees based upon a purported error of law by the Arbitrators in interpretation the application of Section 6F to arbitration proceedings. *See Lyons, supra* at 79. In addition, the enactment of Section 6F did not displace the power of a court or an arbitrator for that matter under the common law to award attorneys' fees for bad faith and, in any event, an arbitrator has the power to award any relief that a court can award under the circumstances.

General Laws Chapter 231, § 6F [Add. 105], was inserted by St. 1976, c. 233, s 1. *Miaskiewicz v. LeTourneau*, 12 Mass.App.Ct. 880, 881 (1981). Prior to the enactment of that statute in 1976, courts had broad equitable powers to award counsel fees upon a showing of bad faith as one of the traditional exceptions to the general American Rule that counsel fees are not part of the costs awarded to a successful litigant. *Id.* (string citations omitted). Thus, "it is

by no means evident that counsel fees would not have been awarded in this case even without the enactment of G.L. c. 231, s 6F." *Miaskiewicz*, 12 Mass.App.Ct. at 881. In any event, the fact that Section 6F does not mention arbitrators in the list of entities that are empowered to award fees under the statute is of no moment because an arbitrator has authority to grant any relief, legal or equitable, that can be given by a court of law, absent contractual limitations in the parties' arbitration agreement. *Apache Bohai Corp. LDC v. Texaco China BV*, 480 F.3d 397 (5th Cir. 2007).

The Supreme Judicial Court rejected a similar statutory interpretation argument in *Drywall Sys., Inc. v. ZVI Constr. Co.* In that case, the defendant claimed that the arbitrator could not award multiple damages under Section 11 of M.G.L. c. 93A because "Section 11 contains repeated references to the commencement of an action in 'court,' and the findings required by the 'court' before various levels of damages may be awarded." 435 Mass. 664, 669 (2002). While acknowledging that "an arbitrator is not a 'court,'" the SJC held that "the term does not preclude an arbitrator from imposing multiple damages any more than the term 'court' precludes an arbitrator

from considering a claim under s. 11." *Id.* at 669.

Similarly, the Wisconsin Court of Appeals held that an arbitrator had the power to award attorneys' fees under a Wisconsin fee shifting statute even though the statute only permitted awards of attorneys' fees by a "court of competent jurisdiction" in *Winkelman v. Kraft Foods, Inc.*, 2005 WI App 25, 279 Wis. 2d 335, 693 N.W.2d 756, 2005 Wisc. App. LEXIS 76 (Wis. Ct. App. 2005) [Add. 84]. In *Winkelman*, the arbitrator awarded attorneys' fees to the claimant reasoning that the AAA Rules permitted an award of attorneys' fees where they are "authorized by law," and that the fee award was authorized by a Wisconsin fee-shifting statute, Wis. Stat. § 100.18. 2005 Wisc. App. LEXIS 76, * 5 [Add. 86]. The respondent challenged the arbitrator's award of attorneys' fees to the claimant on the basis that Wis. Stat. § 100.18 only permitted fee-shifting relief in a "court of competent jurisdiction." *Id.* at 17 [Add. 90]. The Wisconsin Court of Appeals rejected this contention reasoning that:

> "Winkelman's dispute with Kraft was decided by an arbitrator instead of a court only because Kraft's standard form contract so required. As we have also explained, the rules the parties agreed to permitted the

> arbitrator to award attorney fees if 'authorized by law,' and the arbitrator looked to Wisconsin substantive law to determine whether attorney fees could be awarded on the present facts. Her authority to award the fees thus derived from the parties' contract and the rules it adopted, not directly from the statute itself. The only role the statute played was to demonstrate that Wisconsin substantive law authorizes attorney fees to be awarded when a party is induced by another's misrepresentations to enter into a contract."

Id. at * 17 [Add. 90 - 91].

And in *Rose Construction,* the Court of Appeals rejected the trial court's reasoning that the Tennessee Prompt Pay Act, which authorized the award of attorneys' fees for bad faith, was inapplicable to the arbitration because the language in the Prompt Pay Act provided that an action may be brought in a "chancery court." *Rose Construction,* 2001 Tenn.App.Lexis 961, * 15 [Add. 81]. Aside from holding that the permissive language in the statute did not preclude the commencement of an action under the Prompt Payment Act in a venue other than the chancery court, the Court of Appeals reasoned that a contrary ruling would require that the entire arbitration proceeding was "preempted" because Prompt Payment actions would have to be brought in chancery court and

could not be brought in an arbitration proceeding as the parties had agreed. *Id.* at * 15, fn. 2 [Add. 82].

As in *Drywall Sys., Inc.*, *Winkelman*, and *Rose Construction*, there is no question that the arbitrator had authority to award attorneys' fees under M.G.L. c. 231, § 6F, even though the language of the statute provides for fee-shifting awards by "courts," not arbitrators. Mr. Alex's dispute with the Trustees was decided by an arbitrator instead of a court only because the provisions of the Declaration of Trust for the Beacon Towers Condominium so required. The parties agreed to be bound by AAA Rule 43(d)(ii) by incorporating the AAA Rules in their arbitration agreement. Rule 43(d)(ii) permitted the arbitrator to award attorney fees if 'authorized by law,' and the Arbitrators looked to Massachusetts substantive law under M.G.L. c. 231, s. 6F to determine whether attorney fees could be awarded on the present facts. The Arbitrators' authority to award the fees thus derived from the parties' contract and the rules they adopted, not directly from the statute itself. The only role that Section 6F played was to demonstrate that Massachusetts substantive law authorizes attorney fees to be awarded when a party forces another to

litigate or arbitrate a dispute in bad faith. Given that the Superior Court would have been empowered to award counsel fees under Section 6F under the circumstances of this case, the Arbitrators plainly had the authority to do so as well. *See Drywall Sys., Inc.*, 435 Mass. at 669; *Winkelman*, 2005 Wisc. App. LEXIS 76, * 17; *Rose Construction, Inc., supra* at * 14.

CONCLUSION

For the foregoing reasons, the Appellant, George Alex, respectfully submits that the final judgment of the Superior Court, which vacated the Arbitrators' award of attorneys' fees to Mr. Alex, should be reversed. This case should be remanded to the Superior Court for entry of a judgment confirming all aspects of the Arbitrators' award to Mr. Alex, and awarding him his attorneys' fees incurred in the Superior Court Action regarding the vacatur and confirmation of the Arbitrators' award, as well as his attorneys' fees incurred in this appeal to the Appeals Court.

Respectfully Submitted,
The Appellant, George Alex,
By His Attorneys,

Dated: January 16, 2015

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ADDENDUM

Superior Court Decision Subject to Appeal

Arbitration Awards

AAA Rules

Decisions from Out-of-State Jurisdictions Relied Upon in Appellant's Brief

Statutes

NOTICE SENT
06.13.14
G.S.+L.
M.A.R.
L.+W.
J.M.D.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2013-04045

BEACON TOWERS CONDOMINIUM TRUST

vs.

GEORGE ALEX

(451)

MEMORANDUM OF DECISION AND ORDER ON THE PLAINTIFF'S MOTION TO VACATE THE ARBITRATION AWARD AND DEFENDANT'S MOTION TO CONFIRM THE ARBITRATION AWARD

INTRODUCTION

The plaintiff, Beacon Towers Condominium Trust ("Beacon"), filed this action seeking to vacate an arbitration award issued in favor of the defendant, George Alex ("Alex"). Alex owned two units in one of Beacon's three buildings.[1] The parties engaged a three-member arbitration panel (the "Panel") pursuant to the condominium declaration of trust (the "Trust"). The Panel found in favor of Alex and issued a restitution award with interest. The Panel also awarded legal fees and costs to Alex.

Beacon moves to vacate the award. It argues that the restitution award was outside the scope of the Trust, the parties agreements, and in violation of the statutory remedies provided for in G. L. c. 183A, § 17. Beacon also moves to vacate the award of legal fees arguing that the Panel exceeded its authority in assessing fees. Alex moves to confirm the award.

For the reasons that follow, Beacon's motion is **ALLOWED** in part and **DENIED** in part, and Alex's motion is **ALLOWED** in part and **DENIED** in part. So much of the arbitration award that grants legal fees to Alex is **VACATED**, and the remainder of the award in favor of Alex is **CONFIRMED**.

[1] He sold one unit, but this fact has no bearing on the court's determination.

BACKGROUND

In 1982, Beacon was created with the filing of the Trust pursuant to G. L. c. 183A. Beacon consists of three buildings containing a total of eighty-five units located at 479, 481, and 483 Beacon Street, Boston, Massachusetts. The buildings located at 479 and 481 are connected, while the building located at 483, which is substantially taller then the others, is free standing. On April 7, 2010, an electrical fire in the building at 483 caused significant damage to the building, and made it uninhabitable. The buildings at 479 and 481 suffered no damage.

After the fire, the Trustees of Beacon (the "Trustees") met to determine what to do about the loss. The Trustees decided that it would be in the interests of Beacon to rebuild 483. While the structure of the building was largely intact, the fire substantially damaged the interior. Under the governing statute, the Trustees must determine whether the cost to repair a casualty loss exceeds ten percent of the value of condominium before the casualty. If the loss is less than ten percent, the Trustees may rebuild and whatever is not paid for by insurance may be charged to all unit owners as a common expense. If the cost is greater than ten percent, the statute requires seventy-five percent of all unit owners to approve the construction.

Shortly after the fire, a resident who was also an attorney informed the Trustees that they were legally required to make a formal determination of the cost of repair and the pre-casualty value of the condominium. The Trustees never made that determination, but restoration of 483 commenced in September 2010. The entire restoration plan was never submitted for a formal or informal vote. The Panel found that the Trustees did not take the vote because they knew they could not secure approval from seventy-five percent of owners as is required by G. L. c. 183A, § 17.

On November 3, 2010, the Trustees sent a letter to unit owners indicating that the Trustees were considering replacing the old heating system at 483 Beacon. The letter asked for an informal non-binding vote. Sixty-three unit owners responded. Unit owners from 483 Beacon accounted for fifty-four of the "ballots" returned. Thirty-three owners voted to repair the old system; thirty voted to install the new system. Many owners objected to the installation of the new system because they could not afford their share of the restoration costs. Despite the vote, the Trustees installed a new heating and a building-wide air conditioner system in 483 Beacon. The Trustees never sought formal approval of the reconstruction or the revamping of the heating and cooling systems. No improvements were made to the other buildings.

During this time, Alex owed two units in the undamaged buildings. He and thirteen other residents sent a letter to the Trustees in January 2011 objecting to the entire reconstruction project, and specifically urged the Trustees to determine whether the damage exceeded ten percent, and if it did, to hold the vote required by G. L. c. 183A, § 17. The Trustees did not act on this letter, but instead issued a special assessment of $2.15 million to be paid collectively by all unit owners. Alex was assessed $62,995.00 for the two units he owned. He paid $37,504.78 under protest, some of which was paid from the proceeds of the sale of one of his units.

Alex filed a complaint in Superior Court seeking partition pursuant to G. L. c. 183A, § 17. He also sought an injunction against the Trustees from collecting the special assessment. The court denied the injunction and Alex filed a voluntary dismissal. He then filed for arbitration as provided for in section 5.5.3 of the Trust. The matter was heard before a three-member panel chosen pursuant to the terms of the Trust. Beacon and Alex each chose an arbitrator and then those two arbitrators selected a third neutral arbitrator. The Panel conducted the arbitration under the rules of the American Arbitration Association ("AAA"). The Panel ruled in favor of Alex.

The Panel found that the Trustees had failed to assess the cost to repair the damage. The Panel found that the cost of repair far exceeded ten percent of the pre-casualty value of the condominium. The Panel further determined that the Trustees had failed to formally asses the value of the loss and failed to take the vote required by G. L. c. 183A, § 17 because the Trustees knew they could not obtain the supermajority vote required to undertake the restoration. The Panel determined that the special assessment was unlawful and that Alex was entitled to restitution. Finally, the Panel invited the parties to brief the issue of attorney's fees, which the Panel awarded to Alex.

One member of the Panel dissented from both awards. He agreed that the assessment was improper, but indicated that he would have ordered the Trustees to purchase Alex's unit at market value which is a potential remedy provided for in G. L. c. 183A, § 17. This remedy is ordinarily available to dissenting owners when seventy-five percent of the unit owners approve the reconstruction. The dissenting member of the Panel would also not have awarded attorney's fees. Beacon filed this action seeking to have the Panel's award vacated.

DISCUSSION

I. Standard of Review

"The Uniform Arbitration Act, as set forth in G. L. c. 251, was designed 'to further the speedy, efficient, and uncomplicated resolution of business disputes with very limited judicial intervention or participation.'" Marino v. Tagaris, 395 Mass. 397, 400 (1985), quoting Floors, Inc. v. B.G. Danis of New England, Inc., 380 Mass. 91, 96 (1980). "In the absence of fraud, arbitrary conduct, or procedural irregularity in the hearings, the court's determination is confined largely to whether the arbitrator's award conforms to the terms of the reference submitted to him by the parties." Greene v. Mari & Sons Flooring Co., 362 Mass. 560, 563 (1972). A more

searching review of an arbitrators decision by the courts "would undermine the predictability, certainty, and effectiveness of the arbitral forum that has been voluntarily chosen by the parties." Marino, 395 Mass. at 400. "When parties agree to arbitrate a dispute, the arbitrator's decision is accorded great weight by our courts." Sheriff of Suffolk County v. AFSCME, Council 93, Local 419, 67 Mass. App. Ct. 702, 705 (2006). "Whether an arbitrator has acted beyond the scope of authority conveyed to him is always open to judicial review." Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Auth., 392 Mass. 407, 410-411 (1984).

> [I]f, on review, the court finds that an arbitrator has exceeded his authority in fashioning an award, the court is required to vacate it. . . . The power and authority of an arbitrator is ordinarily derived entirely from [the parties' agreement], and he violates his obligation to the parties if he substitutes his own brand of industrial justice for what has been agreed to by the parties in that contract. . . . [A]n arbitrator's award is legitimate only so long as it draws its essence from the . . . agreement that he is confined to interpret and apply."

School Dist. of Beverly v. Geller, 435 Mass. 223, 228-229 (2001) (citations and internal quotation marks omitted).

"An arbitrator exceeds his authority by granting relief beyond the scope of the arbitration agreement, by awarding relief beyond that to which the parties bound themselves, or by awarding relief prohibited by law." Plymouth-Carver Regional School Dist. v. J. Farmer & Co., 407 Mass. 1006, 1007 (1990) (citations omitted). "Arbitration, it is clear, may not 'award relief of a nature which offends public policy or which directs or requires a result contrary to express statutory provision[.]'" Lawrence v. Falzarano, 380 Mass. 18, 28 (1980), quoting S.E. Eager, The Arbitration Contract and Proceedings § 121.6 (1971).

II. The Restitution Award

The Panel's restitution award was based on the requirements of the Trust, and G. L. c. 183A, § 17. General Laws c. 183A, § 17 provides in relevant part:

> Rebuilding of the common areas and facilities made necessary by fire or other casualty loss shall be carried out in the manner set forth in the by-law provision dealing with the necessary work of maintenance, repair and replacement, using common funds, including the proceeds of any insurance, for that purpose, provided such casualty loss does not exceed ten per cent of the value of the condominium prior to the casualty.

If the loss is greater then ten percent and "seventy-five per cent of the unit owners do not agree within one hundred and twenty days after the date of the casualty to proceed with repair or restoration, the condominium, including all units, shall be subject to partition at the suit of any unit owner." G. L. c. 183A, § 17. If seventy-five percent of unit owners agree to the restoration, any "unit owner who did not so agree may apply to the superior court . . . for an order directing the purchase of his unit by the organization of unit owners at the fair market value thereof as approved by the court." Id. The Trust provides for the same process as G. L. c. 183A, § 17 for rebuilding in the event of a casualty loss.

Beacon argues that Alex is limited to the relief provided by G. L. c. 183A, § 17. The Panel rejected this argument, finding that the Trustees had failed to follow their statutory obligations to make a finding on the cost of damage, or hold a vote to seek approval of seventy-five percent of the unit owners to undertake the repairs. There is a "compelling inequity [in] condominium unit owners being held liable for illegal or unauthorized common expense assessments . . . . [and i]n such a case, it is preferable to carry out the reasonable expectations of the parties." Blood v. Edgars, Inc., 36 Mass. App. Ct. 402, 407 (1994). Here, the Panel found that unit owners would have reasonably expected the Trustees to follow the requirements of G. L. c. 183A, § 17, and that the Trustees failed to do so. The Panel determined that this failure allowed it to fashion a remedy outside those provided in G. L. c. 183A, § 17.

The Panel also found that because the repairs had been completed, both remedies in G. L. c. 183A, § 17 failed of their essential purpose. The forced sale provision would still be available

and practical even after Beacon completed the construction. However, G. L. c. 183A, § 17 does not indicate that the remedies provided therein are exclusive. "It is well established that 'an existing common law remedy is not to be taken away by statute unless by direct enactment or necessary implication.'" Eyssi v. Lawrence, 416 Mass. 194, 199-200 (Mass. 1993), quoting Ferriter v. Daniel O'Connell's Sons, 381 Mass. 507, 521 (1980). "The statutory language, when clear and unambiguous, must be given its ordinary meaning." Bronstein v. Prudential Ins. Co., 390 Mass. 701, 704 (1984), citing Hashimi v. Kalil, 388 Mass. 607, 610 (1983). "When the use of the ordinary meaning of a term yields a workable result, there is no need to resort to extrinsic aids such as legislative history. Moreover, the statutory language is the principal source of insight into legislative purpose." Id., citing Hoffman v. Howmedica, Inc., 373 Mass. 32, 37 (1977) (citation omitted). Here, there is no express language that states that the remedies provided in G. L. c. 183A, § 17 are exclusive.

Beacon argues that, since condominiums are a creation of statute, the remedies provided therein must be exclusive. The Panel was not persuaded by this argument, and neither is the court. There are instances where liability is purely a creature of statute, such as when no remedy existed at common law. See Cosmopolitan Trust Co. v. Cohen, 244 Mass. 128, 131 (1923). In Cosmopolitan Trust Co., the Court held that, "[t]he liability of stockholders for debts of a corporation is wholly the creature of statute. No such liability existed at common law. The statute which creates the liability may also prescribe the remedy for its enforcement." Id.

Beacon's reliance on Cosmopolitan Trust Co. is misplaced. Condominium trusts, like corporations, are a creation of statute, but the responsibilities of trustees is not limited to those duties imposed by statute. The Court in Cosmopolitan Trust Co. held that the statute "may prescribe the remedy" but trustees have responsibilities imposed by the declaration of trust.

Similarly, many responsibilities of corporations are often set forth in the corporate bylaws. Trustees also owe duties as fiduciaries to the Trust as a matter of common law. See Office One, Inc. v. Lopez, 437 Mass. 113, 125 (2002). Even though corporations are creatures of statutory creation, much of their general liability is dictated by the common law. See, e.g., Genga v. New York, N. H. & H. R. Co., 243 Mass. 101, 105 (1922) (holding that it is without question that a corporation is liable under the common law for torts committed by its employees acting within the scope of employment).

Cosmopolitan Trust Co. is inapposite, as it involved a situation where the liability of the corporation did not exist at common law, and was created exclusively by statute. Here, the Trustees' liability for the unlawful assessment was created by the Trust, G. L. c. 183A, and elements of the common law. The Trustees did not follow the procedure provided for both in the Trust and G. L. c. 183A, § 17, and it was reasonable for the Panel to determine that the Trustees' inequitable behavior dictated the result the Panel ultimately reached. Even if it was error, G. L. c. 183A, § 17 does not expressly prohibit the restitution award, and absent such a statutory prohibition, a court will generally uphold an arbitration award. See Lawrence, 380 Mass. 28-29.

Moreover, considering the equities of the situation, it was not unreasonable for the Panel to determine that the proper remedy was to have Beacon reimburse Alex for the unlawful assessment. Cf. Blood, 36 Mass. App. Ct. at 407. After all, "it is improper to challenge the lawfulness of a common expense assessment in a condominium by nonpayment[.]" Id. at 403. An individual must pay an assessment before he or she may challenge its validity in court. Id. If a court or other adjudicator body later finds the assessment unlawful, the person subject to the unlawful assessment must be entitled to recover the payment. See id.

The court also grants arbitrators great latitude in crafting remedies. "If the arbitrators in assessing damages commit an error of law or fact, but do not overstep the limits of the issues submitted to them, a court may not substitute its judgment on the matter." Lawrence, 380 Mass. 28-29. Absent an express statutory provision, or an agreement by the parties prohibiting the award, the Panel did not exceed its authority in awarding restitution. See id. The restitution award must be upheld. See Plymouth-Carver Regional School Dist., 407 Mass. at 1007.

III. Attorney's Fees

The Panel awarded Alex legal fees. This was error, and contrary to law. Under the Massachusetts Uniform Arbitration Act, "[u]nless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, *not including counsel fees*, incurred in the conduct of the arbitration, shall be paid as provided in the award." G. L. c. 251, § 10 (emphasis added). "The statute generally precludes an award of attorney's fees incurred in arbitration proceedings, absent an express agreement of the parties. . . . [However, a]ttorney's fees may be awarded if mandated under a statutory claim submitted to arbitration." LaRoche v. Flynn, 55 Mass. App. Ct. 419, 420 (2002) (citation omitted).

The parties' agreement did not grant the Panel the power to assess legal fees. Whether the imposition of fees was appropriate turns on whether the assessment of fees was permitted by statute. See id. The Panel relied on Superadio L.P. v. Winstar Radio Prods., LLC, 446 Mass. 330 (2006), and G. L. 231, § 6F in granting attorney's fees. Superadio L.P. did not involve the imposition of legal fees by an arbitrator. The court in Superadio L.P. upheld an order by the arbitrator that included a discovery sanction against one party for failure to produce documents. Id. at 338. The power of an arbitrator to issue discovery sanctions is not precluded by statute.

Superadio L.P. has no relevance to the present matter because the imposition of legal fees by an arbitrator is generally prohibited by G. L. c. 251, § 10.

The Panel also relied on G. L. c. 231, § 6F in awarding legal fees to Alex. General Laws 231, § 6F provides:

> Upon motion of any party in any civil action in which a finding, verdict, decision, award, order or judgment has been made by a judge or justice or by a jury . . . the court may determine, after a hearing, as a separate and distinct finding, that all or substantially all of the claims, defenses, setoffs or counterclaims, . . . made by any party who was represented by counsel during most or all of the proceeding, were wholly insubstantial, frivolous and not advanced in good faith. . If such a finding is made with respect to a party's defenses . . . the court shall award to each party against whom such defenses, setoffs or counterclaims were asserted . . . an amount representing the reasonable counsel fees, costs and expenses of the claimant in prosecuting his claims or in defending against those setoffs or counterclaims found to have been wholly insubstantial, frivolous and not advanced in good faith.

For the purposes of § 6F, "court" means "the supreme judicial court, the appeals court, the superior court, the land court, any probate court and any housing court, and any judge or justice thereof[.]" G. L. 231, § 6E. The Appeals Court held that a District Court did not have the power to grant legal fees. Tilman v. Brink, 74 Mass. App. Ct. 845, 853-854 (2009). "The Legislature, if it chose to give those courts such power, could easily have included them in the applicable statute." Id. General Laws c. 231, § 6E does not mention arbitrators, and G. L. c. 251, § 10 specifically precludes the granting of legal fees in arbitration proceedings. The portion of the award granting Alex legal fees exceeded the Panel's authority, was contrary to law, and must be vacated.

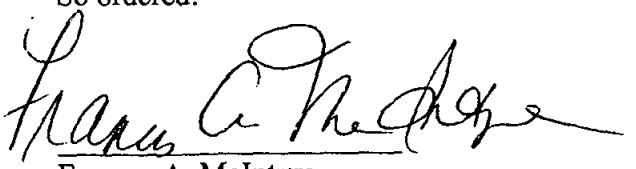
CONCLUSION AND ORDER

The plaintiff, Beacon Towers Condominium Trust's, motion to vacate the arbitrators' award (paper # 5) is **ALLOWED** in part and **DENIED** in part.

The defendant, George Alex's, motion to confirm the arbitrators award (paper # 8) is **ALLOWED** in part and **DENIED** in part.

So much of the arbitration award granting legal fees to Alex is **VACATED**; the remainder of the award is **CONFIRMED**.

So ordered:



Frances A. McIntyre
Justice of the Superior Court

Date: June 12, 2014

Commonwealth of Massachusetts
County of Suffolk
The Superior Court

11

CIVIL DOCKET# **SUCV2013-04045**

Beacon Towers Condo Trust
vs
George Alex

JUDGMENT

This action came on before the Court, Frances A. McIntyre, Justice, presiding, and upon consideration thereof,

It is **ORDERED and ADJUDGED:**

The arbitration award that grants legal fees to Defendant George Alex is **VACATED**, and the remainder of the award in favor of Defendant Alex is **CONFIRMED**.

Dated at Boston, Massachusetts this 11th day of July, 2014.

Michael Joseph Donovan,
Clerk of the Courts

By: Timothy Walsh
Assistant Clerk

notice sent
7-15-14
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JUDGMENT ENTERED ON DOCKET 7-15 2014
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P.58(a)
AND NOTICE SEND TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

IN ARBITRATION BEFORE JAMS

In the Matter of the Arbitration Between:

George Alex, individually and on behalf of Beacon Towers Condominium Trust,

Claimant,

Case No. 1400013838

-and-

Jennifer J. Lau, William Deacon, James Kaspryk, Gary Moss and Robert Tierney Individually and in their Capacity as Trustees of the Beacon Towers Condominium Trust,

Respondents

INTERIM AWARD

I. Introduction

Claimant is the owner of two condominiums subject to the terms and conditions of the Respondent Beacon Towers Condominium Trust. The condominium units are located in three adjacent buildings, including a 10 story building, which sustained substantial fire damage on April 7, 2010. Because the insurance proceeds were insufficient to restore the property, the Respondent levied a special assessment on the Unit Owners to make up the shortfall. Claimant, who owned two units in a portion of the complex that was not damaged by the fire, commenced this arbitration in April 2010 seeking, among other things, a determination that the special assessment imposed on him was not authorized by the Trust's Bylaws.

II. Procedural Background

Section 5.5.3 of the Trust's By-laws requires that this dispute be arbitrated under the rules of the American Arbitration Association. The parties agreed to have JAMS administer the arbitration. [1]The party -appointed arbitrators are attorney Stephen T. Kunian, designated by the Claimant and attorney Charles A. Perkins, Jr., designated by the Respondents. The party-appointed arbitrators designated Hon. Patrick J. King (Ret.) as the third arbitrator, all in accordance with the aforementioned arbitration provision.

In Procedural Order No. 1, dated February 1, 2013, the Panel directed counsel for the Claimant to submit certain documents, including a statement of the issues or claims to be decided by the panel. In Procedural Order no, 2, dated February 11, 2013, the Panel ruled that the following issues were arbitrable under section 5.5.3 of the Trust's Bylaws: 1. whether the amount of the casualty loss to the Condominium exceeded 10 percent of the value of the Condominium prior to the fire; and 2. whether the replacement of the existing heating system, the installation of a new fire sprinkler system and the completion of other electrical and plumbing upgrades constituted "improvements" within the meaning of the Section 5.5.2 of the Trust's By-laws. The Panel also ruled that the relief, if any, that Claimant is entitled to should be addressed in post -hearing brief and, should the Panel rule that Claimant is entitled to an award of attorneys' fees, the fee request would be subject to a further motion and briefing schedule.

The arbitration took place at JAMS in Boston, Massachusetts on June 3 and 4, 2013. Claimant was represented by attorneys J. Mark Dickison and Ryan Ciporkin; Respondents were represented by attorney Mark A. Rosen. At the conclusion of the arbitration, the parties were

[1] The demand for arbitration was initially filed with REBA.

granted leave to file post-hearing memoranda and proposed findings of fact.[2] The last brief was filed on July 12, 2013 at which time the hearing closed. The parties agreed to extend the time for the panel to render a decision to September 13, 2013. After considering the arguments of counsel, the stipulations of fact and the credible evidence introduced at the arbitration hearing, the Panel now enters the following findings of fact, rulings of law and Interim Award.

III. Parties

Claimant George S. Alex resides at 479 Beacon Street, Unit 11, Boston, Massachusetts. He purchased this unit in 1997 and recently sold it. He will be moving out in September 2013. He is also the owner of Unit 14 at 481 Beacon Street. Claimant brings this arbitration on behalf of himself and the Beacon Towers Condominium Trust.

Respondents Jennifer J. Lau, William Deacon, James M. Kaspryk, Gary Moss and Robert Tierney are sued individually and as Trustees of the Beacon Towers Condominium Trust. They all own units at 483 Beacon Street. With the exception of Robert Tierney, the Respondents all served as the Board of Trustees on May 3, 2010. At that time, Blanc Waldref occupied the seat now held by Mr. Tierney.

IV. Beacon Towers Condominium

The Beacon Towers Condominium (the Condominium) was created pursuant to G.L. c. 183A, §17 in 1982. The Beacon Towers Condominium Trust (the Trust) is the organization of Unit Owners for the Condominium. Section 5 of the Trust constitutes the By-laws of the Trust. The Board of Trustees for the Beacon Towers Condominium Trust (the Trustees) is a group of

[2] Most of the material facts in this case are undisputed and are set forth in the stipulations and in the proposed findings. For the purpose of this decision, it is not necessary to address all of the agreed facts or to decide the few disputed facts. Since the Panel rules in favor of the Claimant on his claim based on G.L.c. 183A, §17, there is no need to address in detail the other grounds for relief because there would be no difference in the relief granted.

individuals responsible for operating, maintaining, and managing the common elements for the Condominium and the business of the Trust.

The Condominium is comprised of three adjacent buildings in the Back Bay section of Boston, Massachusetts, numbered 479, 481 and 483 Beacon Street. There 85 units in total, with 69 of the units in the building at number 483, which is a 10 story building. The buildings at 479 and 481, containing 16 units, are connected at the parlor and basement levels and have common mechanical systems including heat, water and electricity. The building at number 483 has always had its own separate mechanical systems.

V. Common Areas and Facilities

Section 5 of the Master Deed of the Condominium defines common areas and facilities as follows:

(a) The land....

(b) All portions of the Building not included in any unit by virtue of the Plan and section 4 above, including, without limitation, the following....:

1. The foundation, structural members, beams, supports, exterior windows and doors leading from units to common areas and exits of the buildings, walls between units or between a unit and a common area...,and structural walls and other structural components contained entirely within any unit;
2. [common entrances, stairs, hallways, elevators and mailboxes];
3. [heat, water, electric and related equipment excluding equipment contained in and servicing a single unit];
4. All conduits, chutes, plumbing, wiring, flues and other facilities for the furnishing of utility services....and

(c) Laundry area, boiler and utility room, and storage areas located in the basement of the 10 -story building; the two apartment suites, storage areas and furnace room located in the

basement of the 4 story building; and the apartment suite, bathroom and office located in the first floor of the 10 story Building.

Section 4 of the Master Deed of the Condominium defines the boundaries of each unit as the plane of the upper surface of the subflooring, the plane of the upper surface of the finish ceiling material, the plane of the surface of the wall studs facing the unit of the walls, the plane of the interior surface of the studs of the exterior walls, the exterior surface of the doors leading to the common areas, the exterior surface of the glass windows, exterior surface of window sash, and fireplaces. Thus, sections 4 and 5, read together, define the common areas and facilities generally as everything excluding what is within the interior surfaces of the units including kitchen and bathroom cabinets, fixtures and appliances.

VI. Insurance Coverage

Section 5.8.1(a) of the By-laws requires that the Trustees maintain casualty insurance for "all of the common areas and facilities and all of the Units excluding the personal property of the unit owners therein... in an amount not less than 100% of their replacement value." Thus, damage to the interior surfaces, kitchen cabinets, bathroom cabinets and appliances in each unit would be insured by the Master Policy. Thus, the Trustees act as insurance trustees for the Unit Owners in maintaining insurance for loss to their individual units caused by a fire or other casualty. The insurance proceeds received by the Trust for the loss caused by the fire included losses to the individual units as well as loss to the common areas and facilities, or property of the Trust.

VII. Catastrophic Fire

On April 7, 2010, there was a major nine-alarm electrical fire in 483 Beacon Street which caused substantial damage throughout the building rendering it uninhabitable. Approximately 100 residents had to vacate the building and could not return until the building was restored and an occupancy permit issued in September 2011. The other two buildings were not affected by the fire.

VIII. Decision to Rebuild

Within 120 days of the fire, the Trustees were obligated to certify whether or not the damage is in excess of 10 percent of the value of the Condominium. G. L. c. 183A, § 17. This obligation was brought to the attention of the Trustees within a few weeks of the fire. They were advised in a May 3, 2010 email from an attorney who lived in one of the units, concerning the agenda for a May 4, 2010 conference call, that:

> I've talked to some of you about this. There is a MA statute (echoed in our condo docs at section 5.5.1 of the Declaration of Trust) that requires Trustee certification as to whether or not the damage is in excess of 10% of the value of the building. My law partners have advised me that this certification is a crucial first step to any rebuilding, and I just wanted to make sure everyone knows about it. The excerpted statute is below. Let me know if you have any questions

As we will see, it appears that the Trustees decided to ignore their obligation to certify whether or not the fire damage exceeded 10 percent of the value of the Condominium.

The Trustees held numerous meetings with the unit owners to discuss the options available for rebuilding and the likely cost. Architects and other professionals attended to provide information and to answer questions. The Trustees also created a web site to assist in communicating with Unit Owners. In June 2010, the Trustees hired Grassi Design Group, Inc. as the project architect. James Harlor, a public adjuster, was hired to negotiate with the insurance

company. Metric Construction was hired to restore the building. By August 2010, the architect had a pretty good idea of what needed to be done to restore the building. On August 6, 2010, the Trustees signed a contract with Grassi Design Group, Inc. for architectural services for a project estimated cost of $7,000,000.

At the September 21, 2010 Unit Owner's meeting, both the question of a special assessment and the question of whether there would be a vote to approve a new heating system for 483 Beacon Street were discussed. By September 21st meeting the Trustees knew that there would be a significant special assessment that many Unit Owners would find difficult to pay. At the September 21st meeting, Guy Grassi reported that the cost for the restoration would be at least $7,000,000.

A dispute over whether to replace the existing outdated heating system or to simply repair it became a major issue early on. Prior to the fire in 2010, all three buildings had 40 year old oil fired boilers connected to a 100 year old single zone steam heating system with a passive exhaust ventilation system. The systems were inefficient, noisy with unequal distribution of heat. The lower floor units were cold in the winter while the upper floor units had to keep windows open due to the excessive heat. None of the Unit Owners could control the heat in their units and many of them found the noise from banging steam pipes annoying. There was no central air condition system in any of the buildings prior to the fire. Over the last few years, Claimant brought these problems to the attention of the Association's property manager and the Board of Trustees.

After the fire, Jessup Engineering Services, LLC (Jessup) was hired by the project architect to conduct an assessment of the heating, ventilation, and air conditioning systems and

related equipment at 483 Beacon Street. Among other things, Jessup was commissioned to determine the operational condition of the existing steam heating system at 483 Beacon Street. Upon completion of the assessment, on October 25, 2010, Jessup determined that the existing heating system, including the steam boilers and related equipment, at 483 Beacon Street remained fully operational and serviceable after the fire. To improve the operation of the existing steam heating system in 483 Beacon Street, Jessup reported that the following things should be completed: (1) replacement and maintenance of radiator air valves; (2) proper pitching of radiators; (3) replacement of the boilers; (4) replacement of the boiler breaching system; (5) re-insulating steam piping, joints, and couplings in various areas; and, (6) improvement of the oil storage area. However, as an alternative to repairing the existing steam heating system, Jessup recommended replacement of the existing heating plant with a new forced hot water gas fired system with individual condominium unit zoning controls and central air conditioning to "enhance occupant comfort and satisfaction considerably." Jessup also recommended replacing the steam heating system at 479-481 Beacon Street.

The existing heating system at 483 Beacon Street, exclusive of the boilers, which were damaged in the fire and had to be replaced, could have been restored to its prior operational condition for about $110,000. The fire insurance policy only paid approximately $100,000 for losses sustained in connection with the pre-existing steam heating system at 483 Beacon Street. The estimated cost to replace the heating system with the gas fired forced hot water heating system, exclusive of air conditioning, was $700,000.

To the Trustees, it made sense to replace the antiquated heating system with a system that would provide more comfortable heating while at the same time paying for itself over time with lower energy bills. Many of the walls in the building needed to be replaced due to the fire so this

was the only opportunity to replace the system at a reasonable cost without inconveniencing occupants. This is also what the outside consultants recommended. This recommendation made sense to the Trustees. However, in order to proceed with their plan to restore the damage caused by the fire, they knew that they were legally required by G.L. c. 183A, § 17 to put their restoration plan to a vote and obtain approval of 75 percent of the Unit Owners. They doubted that the Unit Owners would approve the plan that included the installation of a new heating system but decided to conduct a straw poll to assess the sentiment of the Unit Owners.

On or around November 3, 2010, the Trustees sent a letter to the Unit Owners informing them that the Trustees were considering several options regarding the HVAC systems at 483 Beacon Street and requested feedback by ballot. That letter stated that the Trustees were not required to take an "improvement vote" and they were "not bound to the results." The poll resulted in the following response from 63 of the 85 Unit Owners:

- 33 Unit Owners voted for the repair of the existing steam heating system.
- 30 Unit Owners voted for the replacement of the existing steam heating system.
- 54 ballots were from Unit Owners in 483 Beacon Street. Of the 54 ballots, 26 Unit Owners were for the repair of the existing steam heating system and 28 Unit Owners were for the replacement of the existing heating system.
- 9 Unit Owners from 479-481 Beacon Street returned ballots. 7 Unit Owners, including Claimant voted to repair the existing system and 2 voted for replacement.

By letter dated November 19, 2010, an attorney for the Trustees advised them that the proposed new heating system (option 3) did not require a vote of the Unit Owners since the replacement did not constitute an "improvement." In a second opinion letter, dated December 22, 2010, counsel for the Trustees stated that whether the replacement of the heating system

constituted an "improvement" was "a close question for which there is no definitive legal precedent...." Nonetheless, counsel informed the Trustees that in counsel's opinion the work did not constitute an "improvement."

By contrast to the opinion letters regarding "improvements", there is no written record in evidence that the Trustees ever received a legal opinion that they were not obligated to certify whether or not the damage was in excess of 10 percent of the value of the common areas and facilities. Nor is there any letter advising them that they were not obligated to put the proposed restoration of the building to a vote. As previously noted, the importance of the 10 percent issue was brought to the attention of the Trustees by a lawyer who lived in the building shortly after the fire and the Trustees discussed the issue in early May 2010. Respondent Deacon concedes the Trustees did not put anything to a vote because they could not get 51% in favor of proposal. He was told by attorney Shapiro that putting the issue to a vote would create "chaos."

Respondent Deacon's testimony that the Trustees thought the Condominium was worth $48,000,000 and that the fire damage to the common areas and facilities was less that 10% is not credible. The $48,000,000 value of the Condominium appears to have been pulled out of thin air. There is no credible evidence that the Trustees ever had any reason to believe that the value of the Condominium prior to the fire differed significantly from the approximately $31,000,000 value assessed by the City of Boston. The first written document supporting the claim that the damage to the Trust property was less than 10 percent of the value of the Trust property was the spreadsheet prepared by the Public Adjuster hired by the Trust. That spreadsheet is dated May 31, 2013, a few days before the commencement of the arbitration hearing.

Mr. Deacon's testimony conflicts with the letter, dated February 28, 2011, sent by the Trustees to the Unit Owners. That letter says that no determination has been made by anyone that the casualty exceeds 10 percent of the value of the "Condominium" immediately prior to the fire. That letter goes on to state that "the amount of the loss still has yet to be determined...If the loss were eventually determined to be greater than 10% of the value of the condominium, our plan of restoration could be put in front of an arbitrator who would most likely either approve the plan or order that the condominium be partitioned." The Trustees position from this letter is clear, namely, that they intended to go forward with the restoration without putting it to a vote of the Unit Owners and if and if anyone is not happy with that decision, they can file for arbitration.

By letter dated December 2, 2010, the Trustees notified all Unit owners of their "Heating Option Determination," Their decision was to replace the existing system. The Unit Owners would also be able to have central air conditioning provided that they paid the cost. The results of the Opinion Poll were relegated to the following footnote:

> Opinion Poll is not binding and was for informational purposes only. The results from Bldg. 483 are as follows; 26 owners voted for the repair of the heating system and 28 owners voted for the replacement of the heating system.

Apparently the Unit Owners in 479-481, who would have to pay for the new heating system without any benefit to them, did not merit mention in the footnote.

On January 5, 2011, Maria Vasilopoulos, a Unit Owner of the Condominium, wrote a letter to all Unit Owners and the Trustees stating her objection to the process, providing her analysis of the heating option issues, and urging the Unit Owners to vote on the decision as to whether to repair or replace the heating system at 483 Beacon Street. Also, Sabrina Rossi, another Unit Owner, contacted the Trustees to raise her concerns regarding the issues raised in

Ms. Vasilopoulos' correspondence. In response to Ms. Rossi's letter, the Trustees wrote that Ms. Vasilopoulos' correspondence was not initiated by the Board of Trustees, there was no obligation for Ms. Rossi to take any action whatsoever, and the Heating Option Determination would not be revisited by the Board of Trustees.

The Trustees discussed among themselves the possibility of assessing the costs of replacing the existing steam heating system at 483 Beacon Street to only the Unit Owners at 483 Beacon Street so that the Unit Owners in 479 – 481 Beacon Street would not have to pay for those costs and whether to put this issue to a vote of the Unit owners. The Trustees decided not to pursue this idea after they were advised by counsel that a special assessment limited to 483 Beacon Street would not be legal. This was at a time when the Trustees knew that a special assessment would have to be imposed to cover the cost of restoring 483 Beacon Street and that many Unit Owners were opposed to a special assessment, especially to pay for the cost of upgrading the heating system in 483 Beacon Street. As of early March 2011, the Trustees were negotiating a $2,000,000 loan to help pay for the restoration work. The Trustees did vote to replace the antiquated boiler and roof at 479-481 Beacon Street but decided not to replace the antiquated steam heating system with the type of heating system planned for 483 Beacon Street.

IX. Dissent

The only section of the By-laws that provides for arbitration of disputed Trustee action is set forth in Section 5.5.3. This section deals disputes involving: 1. rebuilding and restoration after casualty; and 2. improvements. In relevant part, it provides as follows:

> In the event that any Unit Owner(s), by written notice to the Trustees, shall dissent from any determination of the Trustees with respect to the value of the Condominium or any other determination or action of the Trustees under this section 5.5, and such dispute shall

not be resolved within 30 days after such notice, then either the Trustees or the dissenting unit owner(s) shall submit the matter to arbitration.....Such arbitration shall be conducted in accordance with the rules and procedures of the American Arbitration Association and shall be binding upon the parties. The Trustees' decision that work constitutes a repair, rebuilding or restoration other than an improvement shall be conclusive and binding on all Unit Owners unless shown to have been made in bad faith.....

Claimant sent the notice of dissent as required by the above quoted provision. On January 19, 2011, Claimant and 13 other Unit Owners sent a letter to the Board of Trustees objecting to the Heating Option Determination and demanding that the Trustees refrain from proceeding with any improvements to the heating system at 483 Beacon Street or other reconstruction work that was not covered by insurance. There was no response to this letter. A second letter was sent on February 4, 2011 by Adam Hark, a Unit Owner in 481 Beacon Street, captioned "second notice of dissent," which was joined by Claimant among other Unit Owners, objecting to the Board of Trustees' decision to replace the existing steam heating system at 483 Beacon Street with a new forced hot water system, based upon: (1) the Trustees' failure to provide a determination and obtain the Unit Owners' approval to proceed with the repairs because the amount of the casualty loss exceeded 10 percent of the value of the Condominium as required by G.L. c. 183A, § 17 and Section 5.5.1 of the By-Laws; (2) the Trustees' failure to obtain the Unit Owners' assent to proceed with the making of improvements to the Condominium as required by G.L. c. 183A, § 18 and Section 5.5.2 of the By-Laws; and, (3) the Trustees' failure to act in the best interests of the Unit Owners.

On February 28, 2011, the Trustees responded to the February 4, 2011 Notice of Dissent. The Trustees said that they were not required to obtain the assent of the Unit Owners to begin rebuilding 483 Beacon Street because no determination had been made by anyone that the

casualty loss exceeds ten percent of the value of the Condominium immediately prior to the fire and the amount of the Condominium's loss had yet to be determined. Even though the letter acknowledges that "[w]e are more than half-way through the rehabilitation process," there is no mention in the letter of any plan to determine whether the casualty loss exceeds 10 percent of the value of the common area and facilities before the fire. It is probable that by February 28, 2011, the Trustees knew that the casualty loss would be greater than 10 percent of the value of the common area and facilities immediately prior to the fire based on the extent of the loss to the common area and facilities and their discussions with their architect and other professionals. After the February 28, 2011 letter, Claimant decided to file a demand for arbitration.

At a Special Meeting of the Unit Owners that convened on March 9, 2011, the Trustees announced to the Unit Owners that they would not convene a Special Meeting of the Unit Owners to vote on whether to repair or replace the existing steam heating system at 483 Beacon Street because "[s]ince only a few Unit Owners responded to the straw poll any opinions from that poll could not be construed to represent the sentiments of the majority of the Unit Owners at Beacon Towers."[3] Thus, in the view of the Trustees, 74% (63 of 85) of the Unit Owners only represented a "few" of the Unit Owners. The majority of Unit Owners who expressed their opinion were opposed to installing a new heating system in 483 Beacon Street. For some Unit Owners it was a question of not being able to afford the extra cost. For others, including Complainant and other Unit Owners in 479 and 481, it did not seem fair for them to have to pay for a new and improved heating system, which did not benefit them, when there was no plan to

[3] From January 4, 2011 to March 9, 2011, there were only four (4) members of the Board of Trustees for the Beacon Towers Condominium Trust. Section 3.1 of the Trust provides for between 3 and 5 Trustees provided that there is always an odd number. This is presumably designed to avoid tie votes and the failure to have an odd number between January and March 2011 would not render actions taken by 4 trustees invalid.

replace their antiquated heating system. The Trustees did look into the feasibility of replacing the 479 and 481 heating system but they decided that it was not practicable to do that in an occupied building because of the costs, and inconvenience and health risks to occupants when asbestos covered pipes were removed.

On July 21, 2011, the Trustees executed a Certificate pursuant to G.L. c. 184, § 35 and c. 183A, § 10(n) in connection with the closing on a $3,000,000 loan secured by the Trustees to finance the uninsured costs of completing the rebuilding of 483 Beacon Street. In the Trustee Certificate the Trustees attested under the pains and penalties of perjury that, to the best of their knowledge, their execution of the loan documents with the lender does not conflict with any law or governing document of the Condominium. At that time the Trustees knew that they had not complied with G.L. c. 183A, § 17 and Article 5.5.1 of the Trust's by-laws.

X. Special Assessment

On November 10, 2011, to make up for the shortfall in restoring the fire damage to 483 Beacon Street, the Trustees specially assessed the sum of $2,150,000.00, representing the Trustees' calculation of the uninsured costs of completing the restoration of the building, to all of the Unit Owners in the Association based upon their percentage interests in the Condominium as reflected in the Master Deed. Later that month, Claimant filed an action in the Superior Court seeking an injunction to stop the special assessment. After the court refused to grant the requested relief, Claimant voluntarily dismissed the action.

The Trustees assessed Claimant in the amount of $30,143 for Unit No. 11 of 479 Beacon Street and the sum of $32,852 for Unit No. 14 of 481 Beacon Street, for a total assessment of $62,995. Under protest, Claimant elected to pay the assessments for his two units on a payment plan requiring Claimant to pay the sum of $325.19 for Unit No. 11 in 479 Beacon Street and

$354.42 for Unit No. 14 in 481 Beacon Street on the first of every month. When Claimant sold Unit 11 at 479 Beacon Street he paid the balance of the special assessment owed on that unit. As of June 2013, Claimant has paid, under protest, a total of $6,652.94 towards the special assessment for Unit No. 14 in 481 Beacon Street. Thus, as of June 2013, Claimant paid $36,795.94 in special assessments.

Discussion

Massachusetts General Laws Chapter 183A provides the mechanism for the creation and management of condominium properties. Chapter 183A sets forth the minimum requirements for the establishment of the condominium, its governance and operation. It was established to clarify the legal status of a condominium which encompasses both individual and group ownership that entitles a unit owner to exclusive possession of his/her unit and an undivided interest as a tenant in common with the other unit owners in the common areas of the condominium. Lallo v. Szabo, 75 Mass. App. Ct. 1 (2009). After its creation, the condominium is managed by an "organization of unit owners," which may be a corporation, trust or unincorporated association. Cote v. Levin, 52 Mass. App. Ct. 435, 439 (2001). The governing body of the organization is the equivalent of a board of directors of a corporation with the unit owners acting as the shareholders. Id. The organization of unit owners is responsible for the management of the common areas and facilities of the condominium. Id. This responsibility includes all necessary work addressing the maintenance, repair and replacement of the common areas and facilities in accordance with the by-laws of the organization. G.L. c. 183A, §§ 1,5,10. The organization's authority only extends to those areas that are deemed common areas by the master deed or the enabling statute. G.L. c. 183A, §§ 1, 10.

Here, the organization of unit owners is the Trust. The governing body of this organization is the Board of Trustees, the Respondents in this proceeding. The Master Deed for Beacon Towers addresses the scope of the property that belongs to the Trust. The Trust, including By-laws, sets forth the terms and conditions by which the Condominium will be governed and operated and the rights, obligations and powers as between the Trustees and the Unit Owners.

A central legal issue in this case is the interpretation of G.L. c. 183A, § 17, which addresses the restoration of the common areas and facilities of a condominium in the event of a fire or other casualty loss. In construing this statute, the Panel is guided by well established rules of statutory construction. We must look to " the plain language of the statute(s)," Dartt v. Browning -Ferris Industries, Inc., 427 Mass. 1, 7 (1998)(citing Massachusetts Bay Transp. Auth. v. Massachusetts Bay Transp. Auth. Retirement Bd., 397 Mass. 734 (1986)), with the "statute['s] words . . . accorded their ordinary meaning and approved usage," Gateley's Case, 415 Mass. 397, 399 (1993) (citing Hashimi v. Kalil, 388 Mass. 607 (1983)).

Section 17 of G.L. c. 183A is clear and unambiguous. It provides that if the loss to the common areas and facilities, determined as the cost for their restoration, is less than 10 percent of the value of the entire condominium, including all units, immediately prior to the casualty, then restoration of those areas is mandatory and no vote o the Unit owners is required. G.L. c. 183A, § 17. However, if the cost of restoration of the common areas and facilities is greater than 10 percent of the value of the entire condominium, then the approval of 75 percent of the Unit Owners is required before restoration work may be undertaken. Id. This approval must be received within 120 days of the fire or casualty causing the loss. Id.

If 75 percent of the owners do not approve the restoration plan within 120 days, then the condominium, including all units, is subject to partition upon the filing of a suit by any of the Unit Owners. Id. Upon the forced sale of the property required by the partition, the proceeds from the sale along with any remaining common funds are then to be divided in proportion to the Unit Owners' undivided interest in the common areas and facilities. Id. The statute also provides that if 75 percent of the owners do agree to make the necessary repairs to the common areas, any unit owner who dissents from the decision may file a petition in Superior Court seeking an order compelling a trust or unit owner organization to purchase her property at a fair market rate established by the court. Id.

Section 17 of Chapter 183A is designed to protect the minority Unit Owners' interest in the affairs of the organization of Unit Owners following a major casualty loss to the common areas and facilities of a condominium by requiring the Trustees to obtain a supermajority approval of the Unit Owners prior to proceeding with the rebuilding of the condominium following a significant casualty loss. The Trustees were well aware of the above provisions within weeks of the fire in an email from an attorney who lived in the building and undoubtedly discussed this issue with their attorneys.

Similar to the requirements of G.L. c. 183A, § 17, Section 5.5.1 of the By-laws also addresses losses to the Trust Property, i.e., common areas and facilities, caused by a casualty loss. That section of the By-laws designates the Trustees as the parties responsible for determining, "in their reasonable discretion," whether the loss to the Trust Property caused by the casualty exceeds 10 percent of the value of the condominium as a whole immediately prior to the casualty. Once the Trustees make that determination, they are required to notify all the Unit Owners. If the loss to the Trust Property is greater than 10 percent of the value of the

Condominium, then the Trustees must comply with the requirements of G.L. c. 183A,§ 17 and put the proposed rehabilitation plan to the vote of the Unit Owners.

Section 5.5.1 of the By-laws recognizes that the loss to be measured is the loss to the common areas and facilities of the condominium. The section specifically states, "In the event of any casualty loss to the Trust property, the Trustees shall determine in their reasonable discretion whether such loss exceeds ten percent of the value of the condominium..." The Trust property consists of the common areas and facilities of the Condominium as defined by Sections 4 and 5 of the Master Deed. Trust property is given a very broad definition and essentially includes everything except for what is found within the units interior surfaces of the floors, walls, ceilings, windows and doors. See Section 4 of the Master Deed which describes what is owned exclusively by the Unit Owners.

There is no dispute that the Trustees failed to comply with their obligation under G.L. c. 183A,§ 17 and Section 5.5.1 of the By-laws to determine whether or not the loss exceeded ten percent of the value of the Condominium immediately prior to the casualty and to notify the Unit Owners of their determination. If in fact the loss did not exceed 10 percent, then the Claimant has arguably not been harmed so we next turn to the question whether the loss exceeded 10 percent.

The parties dispute whether the "loss" under the statute and By-laws refers to the entire Condominium or just the common areas and facilities. We rule that G.L. c. 183A § 17 is clear and unequivocal. The 10 percent casualty loss refers to the loss to the common areas and facilities and not the loss to the Condominium. We know that the amount spent to restore the Condominium was in excess of $10,000,000. That cost included the cost to repair the common areas and facilities, the cost to repair property owned exclusively by the Unit owners and

perhaps $100,000 or so spent on deferred maintenance, such as, repointing the exterior bricks, repairing fire balconies and filling in vaults under the sidewalk.

In order for Claimant to prevail on his claim that the Trustees breached their obligations under Section 17 by restoring the common areas and facilities without a vote of the Unit Owners, he has to prove that the loss to the common areas and facilities exceeded 10 percent of the value of the Condominium before the fire.

The Panel found credible the testimony of J. Paul Morgan, Jr., Claimant's expert, that the value of the Condominium prior to the fire was $32,800,000. This is close to the $31,263,600 assessed by the City of Boston as the value at the time of the fire.

Claimant has also established that the loss to the common areas and facilities exceeded 10 percent or $3,200,000. We infer from the credible evidence that that the cost to repair the common areas and facilities was in excess of $5,000,000. More than 70 percent of the units in 483 Beacon Street had to be gutted in order to remove mold, asbestos covered heating pipes, electrical wiring, walls, ceilings and floors. Nearly all of this work involved restoring the common areas and facilities. The only property replaced that was the exclusive property of the Unit Owners was the interior surface of the units, kitchen and bathroom cabinets, appliances and fixtures. Given the small size of the typical units (60% under 500 square feet, including one with only 240 square feet), it is unlikely that the cost spent on property belonging exclusively to the average Unit Own exceeded $20,000. This finding differs significantly from the testimony of Mr. Harlor, Respondents' expert, who testified that the damage to the common areas and facilities was only $2,348,200. The panel did not find Mr. Harlor's testimony credible. The following examples illustrate our reason for giving no weight to his opinion. Mr. Harlor attributes none of the approximately $100,000 to restore unit 85 as a common area expense. That

unit consists of only 635 square feet. It makes absolutely no sense that repairing the portion of the unit owned exclusively by that Unit Owner would cost anything remotely close to $100,000. Another example is unit 84, consisting of 330 square feet. Here, Harlor contends it cost $68,000 to repair the property owned exclusively by the Unit Owner. Where a unit is gutted, as more than 70 percent were, it is obvious that most of the damage is to the Trust Property. Mr. Harlor excluded much of the damages to the Trust Property from his calculation of common area losses.[4]

We now turn to the relief that Claimant is entitled to.

Relief

Respondents contend that the only relief that the Claimant is entitled to is to allow him to return to the Superior Court for an order of partition so that all units in the buildings can be sold. This is the relief that would have been available under G.L c. 183A, § 17 had the Trustees fulfilled their responsibilities under Section 17 and Section 5.1.1 of the By-laws three years ago. In support of their position, Respondents argue that the Panel cannot award relief which is contrary to a statutory provision, citing Lawrence v. Falzarano, 380 Mass. 18, 28 (1980); Bureau of Special Investigations v. Coalition for Public Safety, 430 Mass. 601, 604 (2000), and that Claimant is not entitled to relief outside of a statute "where the statute which creates the right and imposed the liability also prescribes the form of remedy," Cosmopolitan Trust Co. v. Cohen, 244 Mass. 128, 131-134 (1923).

The cases cited by Respondents do not limit the relief available in this arbitration for the

[4] The arbitrators find it unnecessary to address Claimant's remaining grounds for relief because the resolution of those claims would not result in any different relief. In particular, as for the issue of whether the new heating system, and the code upgrades involving the sprinkler and fire alarm systems constitute "improvements", we find it unnecessary to address this issue as a result of the decision set forth above.

following reasons. It is well-established that a common law remedy is not to be taken away by statute unless by direct enactment or necessary implication. Eyssi v. Lawrence, 416 Mass. 194, 199-200 (1993); Ferriter v. Daniel O'Connell's Sons, 381 Mass. 507, 521 (1980). The courts "consider the statute in light of the common law ... and we do not construe a statute `as effecting a material change in or a repeal of the common law unless the intent to do so is clearly expressed." Suffolk Constr. Co. v. Division of Capital Asset Mgt., 449 Mass. 444, 454 (2007), quoting Riley v. Davison Constr. Co., 381 Mass. 432, 438 (1980). Thus, where a remedy exists at common law and a statute governs the matter, the critical inquiry is not whether the statute expressly grants the requested relief, but rather whether the statute expressly precludes the relief that was traditionally available under the common law.

The case relied on by the Respondents, Cosmopolitan Trust Co., concerned the liability of stockholders for debts of a corporation. 244 Mass. at 131. In that case the Court observed that such liability is wholly the creature of statute and that no such liability existed at common law. Id. Given that "the statute which creates the liability may also prescribe the remedy for its enforcement," the Court found that "it is necessary to resort to the terms of the statute to determine the nature and extent of the liability of stockholders in trust companies and the means for its enforcement." Id. at 131-132. Ruling that where the statute which creates the right and imposes the liability also prescribes the form of remedy, that form of remedy alone must be pursued, the Court held that the plaintiff commissioner was limited to the remedies specifically set forth in the statute at issue, G. L. c. 172, § 24 in enforcing the liability of stockholders in a trust company for its debts, contracts and engagements. Id. at 134.

We rule that Cosmopolitan Trust Co. is not controlling in this case. Unlike the remedies available to the commissioner in seeking to hold stockholders liable for the debts of a

corporation which liability and remedy was created by statute, G. L. c. 172, § 24, and did not exist at common law, the liability of a unit owner for a special assessment of the costs of restoration after a casualty loss is created as a matter of contract by virtue of the governing documents of the Condominium, not by G.L. c. 183A. Moreover, the remedies of declaratory relief and restitution have traditionally been available to Unit Owners aggrieved by unlawful assessments under the common law. See Blood v. Edgars, Inc., 36 Mass.App.Ct. 402, 407 (1994); Kaplan v. Boudreaux, 410 Mass. 435, 436 (1991); Commercial Wharf East Condominium Assn. v. Waterfront Parking Corp., 407 Mass. 123, 124 (1990).

While Sections 17 and 18 of the statute provide various remedies to unit owners where the governing board does not obtain the supermajority approval of the unit owners to perform certain work on the common elements, those sections do not expressly preclude the award of declaratory relief or restitution where the governing board fails to comply with the procedures in the Condominium Act and Declaration of Trust. Given that Sections 17 and 18 of the did not create the liability of a unit owner for special assessments stemming from the costs of completing alterations to the common elements of the condominium or the remedy to a unit owner aggrieved by an unlawful assessment, and those sections of the statute do not expressly preclude the award of declaratory relief or restitution, the award of declaratory relief and restitution is not contrary to any provision in G.L. c. 183A and may therefore properly be awarded to the Claimant in this case. See Eyssi v. Lawrence, 416 Mass. 194, 199-200 (1993); Ferriter v. Daniel O'Connell's Sons, 381 Mass. 507, 521 (1980); Suffolk Constr. Co. v. Division of Capital Asset Mgt., 449 Mass. 444, 454 (2007); Riley v. Davison Constr. Co., 381 Mass. 432, 438 (1980).

Finally, arbitrators generally are not restricted to granting only those remedies that would be available in a court of law. See, for example, Advanced Micro Devices, Inc. v Intel Corp., 9 Cal. 4th 362, 385-87 (1994) (arbitrators' authority is broader than the remedies available in court so long as the remedy bears a "rational relationship" to the contract and its breach. In Advanced Micro Devices, Inc. the court upheld arbitrator's award stating: "[t]he principle of arbitral finality [and] the practical demands of deciding on an appropriate remedy for breach . . . dictate that arbitrators, unless expressly restricted by the agreement or the submission to arbitration, have substantial discretion to determine the scope of their contractual authority to fashion remedies, and that judicial review of their awards must be correspondingly narrow and deferential."). This case was cited with approval by the Supreme Judicial Court in Superadio L.P. v. Walt "Baby" Love Productions, Inc., 446 Mass, 330,339 (2006). Here, the parties agreed in Section 5.5.3 of the By-laws, which provides for this arbitration, that the arbitration would be governed by the rules of the American Arbitration Association (AAA). Rule 43(a) of AAA's Commercial Rules provides that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including but not limited to, specific enforcement of a contract."

It would not be just and equitable to limit Claimant to the relief the Trustees should have made available to him three years ago. That relief, which would have been practicable three years ago before the insurance proceeds were used to restore the Condominium, is no longer practicable. The building has been restored, the occupants have moved back in and made improvements to their units, and a number of the units have been sold to new owners.

We are also mindful that the underlying purpose of arbitration, to provide for the efficient resolution of disputes without protracted litigation, would be frustrated with relief limited to a

right to go to court card. See ReliaStar Life Ins. Co of N.Y. v EMC National Life Co., 853 F. 2d 59, 63 (2nd Cir. 2009). Since the By-laws do not impose any limitations on the relief the arbitrators can provide, we will grant relief consistent with what is just and equitable.

Restitution and Declaratory Relief

The majority of the Panel agrees that Claimant is entitled to a declaration that the special assessment is void and that Claimant should be awarded as restitution the amount he has paid in special assessments.[5]

Relief for other Unit Owners

Claimant seeks relief not only for himself but on behalf all the other Unit Owners. The Panel rules that this relief would not be equitable. None of the other Unit Owners joined Claimant in this arbitration. While we can only speculate as their reasons for not joining, we do know that granting the requested relief to all of the Unit Owners would likely bankrupt the Condominium causing financial harm and disruption to all Unit Owners.

Recovery against Respondents Individually

Section 3.6 of the Trust provides in general that the Trustees should not be personally liable for actions taken while serving as Trustees. The Panel rules that imposing liability against the Respondents personally is not warranted on the facts of this case.

Fees and Expenses

AAA Rule 43 (b) provides that "...the arbitrator may assess and apportion the fees, expenses, and compensation among the parties in such amounts as the arbitrator determines

[5] In the event a special assessment is needed to satisfy the Award in this arbitration, Claimant should not be included in that special assessment.

appropriate." Claimant will be awarded his fees and expenses including the fees paid for the services of the arbitrators.

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AAA Rule 43 (b) provides that "...the arbitrator may assess and apportion the fees, expenses, and compensation among the parties in such amounts as the arbitrator determines appropriate." Claimant will be awarded his fees and expenses including the fees paid for the services of the arbitrators.

Attorneys' Fees

Claimant seeks an award of attorneys' fees. The majority of the Panel rules that Claimant has established that he is entitled to an award of reasonable attorney's fees. AAA Rule 43 (d) (ii) allows an award of fees where "authorized by law or their arbitration agreement." The arbitration agreement here does not provide for an award of fees. Massachusetts law, which governs Claimant's request for an award of attorneys' fees (section 8.1 of the By-laws), generally follows

the "American Rule" and denies recovery of attorney's fees absent a contract or statute to the contrary. See Preferred Mut. Ins Co. v. Gamache, 426 Mass. 93, 95 (1997). Massachusetts, however, has numerous statutes providing exceptions to this general rule. One of these statutes is G.L. c.231, § 6F which permits an award of reasonable attorney's fees where, among other things, "substantially all of the ...defenses ...were wholly insubstantial, frivolous and not advanced in good faith." Although G.L. c.231, § 6F governs civil actions in Massachusetts courts, we rule that for purposes of our authority under AAA Rule 43 (d) (ii), Massachusetts' law recognizes the availability of attorneys' fees on the facts of this case where the majority of the Panel finds that "substantially all of the ...defenses ...were wholly insubstantial, frivolous and not advanced in good faith." See Superadio L.P. v. Walt "Baby" Love Productions, Inc., 446 Mass, 330 (2006), where the court in upholding an award attorney's fees for violating discovery orders in an arbitration governed by AAA's Rule 43 held that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including but not limited to, specific enforcement of a contract." Id. at 339.

Here, substantially all of the defenses were wholly insubstantial, frivolous and not advanced in good faith. Respondents refused to recognize Claimant's clear rights under G.L. c. 183A, § 17 and forced him to incur the expense of this arbitration knowing that they had no defense to his Section 17 claim. Respondents became aware of their obligations under Section 17 shortly after the fire but chose to ignore their clear obligations because they knew that compliance with the statute would frustrate their objective of completing the renovations as quickly as possible so that they could return to their homes.

ORDER

Within 14 days of the date of this Order, Claimant shall file and serve a motion for an award of attorneys' fees, special assessments paid, and the costs of this arbitration. Said motion shall be supported by affidavits. Respondents shall file and serve their opposition to said motion within 14 days of receipt. In light of summer vacation schedules, this time schedule may be altered with the agreement of counsel. If either side wishes a hearing on the motion, JAMS Senior Case Manager Roxanne Zinkowitz should be notified and advised whether the hearing should be in person or by way of a conference call. Upon ruling on said motion, a Final Award shall enter.

August 12, 2013

Patrick J. King

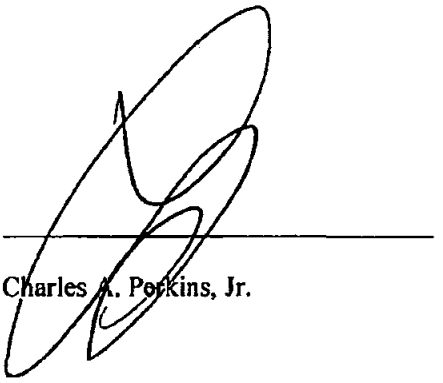
Hon. Patrick J. King (Ret.)

Stephen T. Kunian (by PJK)

Stephen T. Kunian

Opinion Concurring in Part and Dissenting in Part.

I agree with the above findings and ruling that the Respondents failed to comply with G.L. c 183A, § 17 and that Claimant is entitled to recover the costs of this arbitration including the fees paid to the arbitrators, pursuant to Rule 43(b) of the AAA. I dissent from the balance of the decision as it relates to a ruling that the special assessment is void and awards relief to Claimant for restitution for the amount paid and attorneys' fees. It is my opinion that our relief is limited to that set forth in G. L. c. 183A,§ 17, i.e., that the Claimant is required to return to the Superior Court to seek an order of partition.



Charles A. Perkins, Jr.

IN ARBITRATION BEFORE JAMS

In the Matter of the Arbitration Between:

George Alex, individually and on behalf of Beacon Towers Condominium Trust,

Claimant,

Case No. 1400013838

-and-

Jennifer J. Lau, William Deacon, James Kaspryk, Gary Moss and Robert Tierney Individually and in their Capacity as Trustees of the Beacon Towers Condominium Trust,

Respondents

AWARD

Background

Claimant was the owner of two condominiums subject to the terms and conditions of the Respondent Beacon Towers Condominium Trust. The condominium units are located in three adjacent buildings which sustained substantial fire damage on April 7, 2010. The Respondent levied a special assessment on the Unit Owners to make up for an insurance shortfall. Claimant's share of the special assessment was $62,995. Claimant, whose units were in the portion of the complex that was not damaged by the fire, commenced this arbitration in April 2010 seeking, among other things, a determination that the special assessment imposed on him was not authorized by the Trust's Bylaws.[1] On August12, 2013, the Panel entered an Interim

[1] The demand for arbitration was filed with REBA but the parties later agreed to have JAMS administer the arbitration. The case was opened at JAMS on March 26, 2012.

Award in favor of Claimant for the amount he paid in special assessments and directed him to file a motion, supported by affidavits, in support of his request for an award of fees and costs.[2] Thereafter, the parties filed the following: Claimants motion for fees and costs with supporting memorandum and affidavits; Respondent's opposition, including affidavit of Mark Rosen in opposition to affidavit of J. Mark Dickison; Claimant's reply to Respondent's opposition; Respondent's sur-reply; and letter from J. Mark Dickison to JAMS, dated October 4, 2013 relating to fees paid to the Panel. Neither side requested a hearing on the motion for fees and costs and, for this reason, the motion is decided based on the papers. On October 8, 2013, the Panel conferred telephonically regarding the foregoing submissions. After considering the submissions of counsel, the Panel makes the following rulings. [3]

Attorneys' Fees

Claimant seeks an attorneys' fee award of $62,581.50. The amount of a reasonable attorney's fee is largely discretionary with the arbitrators, who are in the best position to determine how much time was reasonably spent on a case, and the fair value of the attorneys' services. Fontaine v. Ebtec Corp., 415 Mass. 309, 324 (1993). See Ross v. Ross, 385 Mass. 30, 38-39 (1982). Respondent urges the panel to reconsider its ruling that Claimant is entitled to recover attorneys' fees and argues that the sum sought is not reasonable.

The Panel declines to reconsider its ruling that Claimant is entitled to recover reasonable attorneys' fees. As to the reasonableness of the fees requested, the Panel has considered the appropriate factors, to the extent present in this case, including "the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result

[2] The total amount paid in special assessments through August 2013 is $37, 504. 78.
[3] The findings of fact and rulings of law set forth in the Interim Award are hereby incorporated by reference into this Award.

obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases." Linthicum v. Archambault, 379 Mass. 381, 388-389 (1979). The Panel finds that a reasonable award of attorneys' fees is $48,750. The Panel agrees with Respondent that the fees awarded should not include compensation for time spent prior to the commencement of this arbitration, the fees incurred in connection with the Superior Court action, and the time spent at the arbitration hearing by attorney Ryan Ciporkin was not necessary, some of the other time was not necessary or excessive, such as the 12.25 hours between April 19 and May 3, 2012 relating to the settlement demand letter.

Costs

Claimant paid $21,601.71 for the time of two of the arbitrators, $3,400 for his expert, J. Paul Morgan and $1,868.50 in miscellaneous expenses, primarily for Westlaw services. The Award will include $26,870.21 for these costs.

Interest

Claimant seeks an award of interest at the Massachusetts interest rate of 12% on the special assessments paid by Claimant. Under the AAA Commercial Arbitration Rules, the Panel has discretion whether to award pre-judgment interest and the interest rate. The panel rules that pre-judgment interest should be awarded at the rate of 4%. Interest shall be awarded at the 12% rate commencing 30 days after the date of this Award.

AWARD

The Panel awards Claimant George Alex $113,753.13 ($37, 504.78 in restitution, pre-judgment interest of $628.14, attorneys' fees of $48,750 and costs of $26,870.21) against Jennifer J. Lau, William Deacon, James Kaspryk, Gary Moss and Robert Tierney, in their

capacity as trustees of the Beacon Towers Condominium Trust. Interest shall accrue at the rate of 12% per annum commencing 30 days from the date of this Award.

October 16, 2013

Patrick J. King
Hon. Patrick J. King (Ret.)

Stephen T. Kunian (by PJK)
Stephen T. Kunian

Opinion Concurring in Part and Dissenting in Part.

I agree with the award of costs but as noted in my dissent from the August12,2013 Interim Award, it is my opinion that relief should be limited to that set forth in G. L. c. 183A,§ 17, i.e., that the Claimant is required to return to the Superior Court to seek an order of partition.

Charles A. Perkins, Jr. (by PTK)
Charles A. Perkins, Jr.

JAMS

THE RESOLUTION EXPERTS®

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Alex, George / Beacon Towers Condominium Trust
Reference No. 1400013838

I, Roxanne Zinkowitz, not a party to the within action, hereby declare that on October 16, 2013 I served the attached AWARD on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Boston, MASSACHUSETTS, addressed as follows:

J. Mark Dickison Esq.
Ryan Ciporkin Esq.
Lawson & Weitzen, LLP
88 Black Falcon Ave.
Suite 345
Boston, MA 02210-2414
Phone: 617-439-4990
mdickison@lawson-weitzen.com
rciporkin@lawson-weitzen.com
Parties Represented:
George Alex

Mark Rosen Esq.
Goodman, Shapiro & Lombardi, LLC
3 Allied Drive
Suite 107
Dedham, MA 02026
Phone: 781-251-9800
rosen@goshlaw.com
Parties Represented:
Beacon Towers Condominium Trust

I declare under penalty of perjury the foregoing to be true and correct. Executed at Boston, MASSACHUSETTS on October 16, 2013.

Roxanne Zinkowitz
rzinkowitz@jamsadr.com

American Arbitration Association
Dispute Resolution Services Worldwide

Commercial Arbitration Rules and Mediation PROCEDURES
(Including Procedures for Large, Complex Commercial Disputes)
Rules Amended and Effective June 1, 2009
Fee Schedule Amended and Effective January 1, 2010

To access the AAA Commercial Arbitration Rules and Mediation Procedures with the previous version of the Standard Fee Schedule, visit the Archived Rules area of the site -- click here.

TABLE OF CONTENTS

IMPORTANT NOTICE

These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA. To ensure that you have the most current information, see our Web Site at www.adr.org.

INTRODUCTION

Each year, many millions of business transactions take place. Occasionally, disagreements develop over these business transactions. Many of these disputes are resolved by arbitration, the voluntary submission of a dispute to an impartial person or persons for final and binding determination. Arbitration has proven to be an effective way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement.

Standard Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by use of the following:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: (describe briefly) We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.

In transactions likely to require emergency interim relief, the parties may wish to add to their clause the following language:

The parties also agree that the AAA Optional Rules for Emergency Measures of Protection shall apply to the proceedings.

These Optional Rules may be found below.

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees.

The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.

Mediation

The parties might wish to submit their dispute to mediation prior to arbitration. In mediation, the neutral mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial Mediation Procedures. There is no additional administrative fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

If the parties want to adopt mediation as a part of their contractual dispute settlement procedure, they can insert the following mediation clause into their contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission:

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)

Large, Complex Cases

Unless the parties agree otherwise, the procedures for Large, Complex Commercial Disputes, which appear in this pamphlet, will be applied to all cases administered by the AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least $500,000 exclusive of claimed interest, arbitration fees and costs.

The key features of these procedures include:

- a highly qualified, trained Roster of Neutrals;
- a mandatory preliminary hearing with the arbitrators, which may be conducted by teleconference;
- broad arbitrator authority to order and control discovery, including depositions;
- presumption that hearings will proceed on a consecutive or block basis.

COMMERCIAL MEDIATION PROCEDURES

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association (AAA) or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for

mediation to any of the AAA's regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via WebFile at www.adr.org.

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

i. A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.
ii. The names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.
iii. A brief statement of the nature of the dispute and the relief requested.
iv. Any specific qualifications the mediator should possess.

Where there is no preexisting stipulation or contract by which the parties have provided for mediation of existing or future disputes under the auspices of the AAA, a party may request the AAA to invite another party to participate in "mediation by voluntary submission". Upon receipt of such a request, the AAA will contact the other party or parties involved in the dispute and attempt to obtain a submission to mediation.

M-3. Representation

Subject to any applicable law, any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

M-4. Appointment of the Mediator

Parties may search the online profiles of the AAA's Panel of Mediators at www.aaamediation.com in an effort to agree on a mediator. If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

i. Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.
ii. If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.
iii. If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the Model Standards of Conduct for Mediators in effect at the time a mediator is appointed to a case. Where there is a conflict between the Model Standards and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-4.

M-7. Duties and Responsibilities of the Mediator

i. The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.
ii. The mediator is authorized to conduct separate or ex parte meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.
iii. The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.
iv. The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.
v. In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.
vi. The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-9. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-10. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

i. Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;
ii. Admissions made by a party or other participant in the course of the mediation proceedings;
iii. Proposals made or views expressed by the mediator; or
iv. The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-12. Termination of Mediation

The mediation shall be terminated:

i. By the execution of a settlement agreement by the parties; or
ii. By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or
iii. By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or
iv. When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

M-13. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection with any

mediation conducted under these procedures.

M-14. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-15. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-16. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-17. Cost of the Mediation

There is no filing fee to initiate a mediation or a fee to request the AAA to invite parties to mediate.

The cost of mediation is based on the hourly mediation rate published on the mediator's AAA profile. This rate covers both mediator compensation and an allocated portion for the AAA's services. There is a four-hour minimum charge for a mediation conference. Expenses referenced in Section M-16 may also apply.

If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the agreement to mediate is filed but prior to the mediation conference the cost is $250 plus any mediator time and charges incurred.

The parties will be billed equally for all costs unless they agree otherwise.

If you have questions about mediation costs or services visit our website at www.adr.org or contact your local AAA office.

Conference Room Rental

The costs described above do not include the use of AAA conference rooms. Conference rooms are available on a rental basis. Please contact your local AAA office for availability and rates.

COMMERCIAL ARBITRATION RULES

R-1. Agreement of Parties*+

(a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

(b) Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration fees and costs. Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least $500,000, exclusive of claimed interest, arbitration fees and costs. Parties may also agree to use the Procedures in cases involving claims or counterclaims under $500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes shall be applied as described in Sections L-1 through L-4 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(d) All other cases shall be administered in accordance with Sections R-1 through R-54 of these rules.

* The AAA applies the *Supplementary Procedures for Consumer-Related Disputes* to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

+ A dispute arising out of an employer promulgated plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures.

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Commercial Arbitrators ("National Roster") and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Initiation under an Arbitration Provision in a Contract

(a) Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

(i) The initiating party (the "claimant") shall, within the time period, if any, specified in the contract(s), give to the other party (the "respondent") written notice of its intention to arbitrate (the "demand"), which demand shall contain a statement setting forth the nature of the dispute, the names and addresses of all other parties, the amount involved, if any, the remedy sought, and the hearing locale requested.

(ii) The claimant shall file at any office of the AAA two copies of the demand and two copies of the arbitration provisions of the contract, together with the appropriate filing fee as provided in the schedule included with these rules.

(iii) The AAA shall confirm notice of such filing to the parties.

(b) A respondent may file an answering statement in duplicate with the AAA within 15 days after confirmation of notice of filing of the demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of the answering statement to the claimant. If a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, and the remedy sought. If a counterclaim is made, the party making the counterclaim shall forward to the AAA with the answering statement the appropriate fee provided in the schedule included with these rules.

(c) If no answering statement is filed within the stated time, respondent will be deemed to deny the claim. Failure

to file an answering statement shall not operate to delay the arbitration.

(d) When filing any statement pursuant to this section, the parties are encouraged to provide descriptions of their claims in sufficient detail to make the circumstances of the dispute clear to the arbitrator.

R-5. Initiation under a Submission

Parties to any existing dispute may commence an arbitration under these rules by filing at any office of the AAA two copies of a written submission to arbitrate under these rules, signed by the parties. It shall contain a statement of the nature of the dispute, the names and addresses of all parties, any claims and counterclaims, the amount involved, if any, the remedy sought, and the hearing locale requested, together with the appropriate filing fee as provided in the schedule included with these rules. Unless the parties state otherwise in the submission, all claims and counterclaims will be deemed to be denied by the other party.

R-6. Changes of Claim

After filing of a claim, if either party desires to make any new or different claim or counterclaim, it shall be made in writing and filed with the AAA. The party asserting such a claim or counterclaim shall provide a copy to the other party, who shall have 15 days from the date of such transmission within which to file an answering statement with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Mediation

At any stage of the proceedings, the parties may agree to conduct a mediation conference under the Commercial Mediation Procedures in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case. Where the parties to a pending arbitration agree to mediate under the AAA's rules, no additional administrative fee is required to initiate the mediation.

R-9. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, potential mediation of the dispute, potential exchange of information, a timetable for hearings and any other administrative matters.

R-10. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within 15 days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale, and its decision shall be final and binding.

R-11. Appointment from National Roster

(a) If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.

(c) Unless the parties agree otherwise when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-12. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-17 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-17(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

(c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 15 days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-13. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

(a) If, pursuant to Section R-12, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.

(b) If no period of time is specified for appointment of the chairperson and the party-appointed arbitrators or the parties do not make the appointment within 15 days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.

(c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-11, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Section.

R-14. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-15. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the demand or answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.

R-16. Disclosure

(a) Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-16 is not to be construed as an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-17. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for

(i) partiality or lack of independence,

(ii) inability or refusal to perform his or her duties with diligence and in good faith, and

(iii) any grounds for disqualification provided by applicable law. The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-12 shall be nonneutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-18. Communication with Arbitrator

(a) No party and no one acting on behalf of any party shall communicate ex parte with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate ex parte with a candidate for direct appointment pursuant to Section R-12 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

(b) Section R-18(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-17 (a), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Section R-17(a), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-18(a) should nonetheless apply prospectively.

R-19. Vacancies

(a) If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

(b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties

agree otherwise.

(c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-20. Preliminary Hearing

(a) At the request of any party or at the discretion of the arbitrator or the AAA, the arbitrator may schedule as soon as practicable a preliminary hearing with the parties and/or their representatives. The preliminary hearing may be conducted by telephone at the arbitrator's discretion.

(b) During the preliminary hearing, the parties and the arbitrator should discuss the future conduct of the case, including clarification of the issues and claims, a schedule for the hearings and any other preliminary matters.

R-21. Exchange of Information

(a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct

i) the production of documents and other information, and

ii) the identification of any witnesses to be called.

(b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.

(c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

R-22. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.

R-23. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party and its representatives.

R-24. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-25. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-26. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing. The requesting party or

parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

R-27. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-28. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

R-29. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-30. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) The parties may agree to waive oral hearings in any case.

R-31. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

R-32. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence

(a) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.

(b) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-33. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-34. Interim Measures**

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

** The Optional Rules may be found below.

R-35. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed. If briefs are to be filed, the hearing shall b e declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided in Section R-32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the closing date of the hearing. The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing.

R-36. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. When no specific date is fixed in the contract, the arbitrator may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to make an award.

R-37. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-38. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-39. Serving of Notice

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party, or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by electronic mail (E-mail), or other methods of communication.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-40. Majority Decision

When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the arbitrators must make all decisions.

R-41. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

R-42. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the manner required by law.

(b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

R-43. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-49, R-50, and R-51. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

(i) interest at such rate and from such date as the arbitrator(s) may deem appropriate; and

(ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-44. Award upon Settlement

If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

R-45. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-46. Modification of Award

Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 days to respond to the request. The arbitrator shall dispose of the request within 20 days after transmittal

by the AAA to the arbitrator of the request and any response thereto.

R-47. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at the party's expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

R-48. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

R-49. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe an initial filing fee and a case service fee to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-50. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-51. Neutral Arbitrator's Compensation

(a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.

(b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.

(c) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-52. Deposits

The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

R-53. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the

AAA.

R-54. Suspension for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

EXPEDITED PROCEDURES

E-1. Limitation on Extensions

Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the demand for arbitration or counterclaim as provided in Section R-4.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, upon the agreement of the other party, or the consent of the arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds $75,000, the case will be administered under the regular procedures unless all parties and the arbitrator agree that the case may continue to be processed under the Expedited Procedures.

E-3. Serving of Notices

In addition to notice provided by Section R-39(b), the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

(a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.

(b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA's mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.

(c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section R-17. The parties shall notify the AAA within seven days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits

At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

E-6. Proceedings on Documents

Where no party's claim exceeds $10,000, exclusive of interest and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. The arbitrator shall establish a fair and equitable procedure for the submission of documents.

E-7. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 days of confirmation of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing

(a) Generally, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two days after the hearing. For good cause shown, the arbitrator may schedule additional hearings within seven business days after the initial day of hearings.

(b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of Section R-26.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 days from the date of the closing of the hearing or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

E-10. Arbitrator's Compensation

Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.

PROCEDURES FOR LARGE, COMPLEX COMMERCIAL DISPUTES

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

(a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;

(b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;

(c) to obtain conflicts statements from the parties; and

(d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

L-2. Arbitrators

(a) Large, Complex Commercial Cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. If the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least $1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each claim and counterclaim is less than $1,000,000, then one arbitrator shall hear and determine the case.

(b) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the Regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Preliminary Hearing

As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be held among the parties and/or their attorneys or other representatives and the arbitrator(s). Unless the parties agree otherwise, the preliminary hearing will be conducted by telephone conference call rather than in person. At the preliminary hearing the matters to be considered shall include, without limitation:

(a) service of a detailed statement of claims, damages and defenses, a statement of the issues asserted by each party and positions with respect thereto, and any legal authorities the parties may wish to bring to the attention of the arbitrator(s);

(b) stipulations to uncontested facts;

(c) the extent to which discovery shall be conducted;

(d) exchange and premarking of those documents which each party believes may be offered at the hearing;

(e) the identification and availability of witnesses, including experts, and such matters with respect to witnesses including their biographies and expected testimony as may be appropriate;

(f) whether, and the extent to which, any sworn statements and/or depositions may be introduced;

(g) the extent to which hearings will proceed on consecutive days;

(h) whether a stenographic or other official record of the proceedings shall be maintained;

(i) the possibility of utilizing mediation or other non-adjudicative methods of dispute resolution; and

(j) the procedure for the issuance of subpoenas.

By agreement of the parties and/or order of the arbitrator(s), the pre-hearing activities and the hearing procedures that will govern the arbitration will be memorialized in a Scheduling and Procedure Order.

L-4. Management of Proceedings

(a) Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases.

(b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case.

(c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot agree on production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.

(d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.

(e) The parties shall exchange copies of all exhibits they intend to submit at the hearing 10 business days prior to the hearing unless the arbitrator(s) determine otherwise.

(f) The exchange of information pursuant to this rule, as agreed by the parties and/or directed by the arbitrator(s), shall be included within the Scheduling and Procedure Order.

(g) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

(h) Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

OPTIONAL RULES FOR EMERGENCY MEASURES OF PROTECTION

O-1. Applicability

Where parties by special agreement or in their arbitration clause have adopted these rules for emergency measures of protection, a party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile transmission, or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

O-2. Appointment of Emergency Arbitrator

Within one business day of receipt of notice as provided in Section O-1, the AAA shall appoint a single emergency arbitrator from a special AAA panel of emergency arbitrators designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed in the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

O-3. Schedule

The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone conference or on written submissions as alternatives to a formal hearing.

O-4. Interim Award

If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim award granting the relief and stating the reasons therefore.

O-5. Constitution of the Panel

Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.

O-6. Security

Any interim award of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.

O-7. Special Master

A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in Section O-1 of this article and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

O-8. Costs

The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the panel to determine finally the apportionment of such costs.

ADMINISTRATIVE FEES

The administrative fees of the AAA are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

In an effort to make arbitration costs reasonable for consumers, the AAA has a separate fee schedule for consumer-related disputes. Please refer to Section C-8 of the *Supplementary Procedures for Consumer-Related Disputes* when filing a consumer-related claim.

The AAA applies the *Supplementary Procedures for Consumer-Related Disputes* to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

Pilot Flexible Fee Schedule

Recognizing the continued fragility of the business environment and wishing to provide cost-saving alternatives to parties filing an arbitration case, the American Arbitration Association is offering an optional fee payment schedule that parties may choose instead of the Standard Fee Schedule. It is a pilot that will be available on cases filed through May 30, 2010 [(1)] , and is intended to give parties added flexibility in both filing and in selection of arbitrators. Please call 1-800-778-7879 or your nearest office if you have questions.

A non-refundable Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. Upon receipt of the Demand for Arbitration, the AAA will promptly initiate the case and notify all parties as well as establish the due date for filing of an Answer, which may include a Counterclaim. In order to proceed with the further administration of the arbitration and appointment of the arbitrator(s), the appropriate, non-refundable Proceed Fee outlined below must be paid. If a Proceed Fee is not submitted within ninety (90) days of the filing of the Claimant's Demand for Arbitration, the Association will administratively close the file and notify all parties. *No refunds or refund schedule will apply to the Filing or Proceed Fees once received.*

Savings for Mutual Arbitrator Appointment by Parties : Proceed Fees may be reduced by fift y (50) percent where parties mutually select and appoint their arbitrator(s) without the AAA providing a list of arbitrators and an appointment process. Parties must provide the Case Manager with the appropriate stipulations and information pertaining to arbitrator(s) that have been mutually selected and have accepted their appointment(s). Forms for confirmation of arbitrators mutually selected and appointed by the parties are available through the Case Manager or AAA regional office.

The Flexible Fee Schedule below also may be utilized for the filing of counterclaims. However, as with the Claimant's claim, the counterclaim will not be presented to the arbitrator until the Proceed Fee is paid.

A Final Fee will be incurred for all claims and/or counterclaims that proceed to their first hearing. This fee will be payable in advance when the first hearing is scheduled, but will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified of a cancellation at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

All fees for the Pilot Flexible Fee Schedule, effective June 1, 2009 to May 30, 2010, will be billed in accordance with the schedule below:

Amount of Claim	Initial Filing Fee	Proceed Fee	Final Fee
Above S0 to S10,000	S300	S550*	S200
Above S10,000 to S75,000	S500	S600*	S300
Above S75,000 to S150,000	S500	S1,500*	S750

Above $150,000 to $300,000	$500	$2,525*	$1,250
Above $300,000 to $500,000	$1,000	$3,750*	$1,750
Above $500,000 to $1,000,000	$1,000	$5,600*	$2,500
Above $1,000,000 to $5,000,000	$1,000	$7,800*	$3,250
Above $5,000,000 to $10,000,000	$2,000	$9,000*	$4,000
Above $10,000,000	$2,500	$11,500* plus .01% of claim amount over $10,000,000 up to $65,000	$6,000
Nonmonetary**	$1,000	$2,750*	$1,250
Consent Award***			

(1) The Pilot Flexible Fee Schedule is subject to change or cancellation at any time prior to the date of May 30, 2010.

*Where an arbitrator has been pre-selected and appointed by the parties, the Proceed Fee will be reduced by fifty percent (50%).

**This fee is applicable only when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to the highest possible filing fee (see fee range for claims above $10,000,000.00).

***The AAA may assist the parties with the appointment of an arbitrator for the sole purpose of having their Consent Award signed. For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879.

All fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are $1,000 for the Initial Filing Fee; $3,750 for the Proceed Fee; and $1,750 for the Final Fee.

Under the Flexible Fee Schedule, a party's obligation to pay the Proceed Fee shall remain in effect regardless of any agreement of the parties to stay, postpone or otherwise modify the arbitration proceedings. Parties that, through mutual agreement, have held their case in abeyance for one year will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be closed.

Note: The date of receipt by the AAA of the demand/notice for arbitration will be used to calculate the ninety (90)-day time limit for payment of the Proceed Fee.

Standard Fee Schedule

An Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. A Case Service Fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the Case Service Fee will remain due and will not be refunded.

All fees for the Standard Fee Schedule, effective January 1, 2010, will be billed in accordance with the schedules below:

Amount of Claim	Initial Filing Fee	Case Service Fee

Above $0 to $10,000	$775	$200
Above $10,000 to $75,000	$975	$300
Above $75,000 to $150,000	$1,850	$750
Above $150,000 to $300,000	$2,800	$1,250
Above $300,000 to $500,000	$4,350	$1,750
Above $500,000 to $1,000,000	$6,200	$2,500
Above $1,000,000 to $5,000,000	$8,200	$3,250
Above $5,000,000 to $10,000,000	$10,200	$4,000
Above $10,000,000	*	*
Nonmonetary Claims**	$3,350	$1,250

** For information regarding the fee schedule for claims in excess of $10 million, see below.*

*** This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of $10,200.*

Standard Fee Schedule for Claims in Excess of $10 Million

The following is the Standard Fee Schedule for use in disputes involving claims in excess of $10 million. If you have any questions, please consult your local AAA office or case management center.

Claim Size	Fee	Case Service Fee
$10 million and above	Base fee of $12,800 plus .01% of the amount of claim above $10 million	$6,000
	Filing fees capped at $65,000	

Fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are $2,800 for the filing fee, plus a $1,250 Case Service Fee. Expedited Procedures are applied in any case where no disclosed claim or counterclaim exceeds $75,000, exclusive of interest and arbitration costs.

Parties on cases filed under the Standard Fee Schedule that are held in abeyance for one year will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed.

Refund Schedule

The AAA offers a refund schedule on filing fees connected with the Standard Fee Schedule. For cases with claims up to $75,000, a minimum filing fee of $350 will not be refunded. For all other cases, a minimum fee of $600 will not be refunded. Subject to the minimum fee requirements, refunds will be calculated as follows:

> 100% of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing.

> 50% of the filing fee will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing.

> 25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

No refund will be made once an arbitrator has been appointed (this includes one arbitrator on a three-arbitrator

panel). No refunds will be granted on awarded cases.

Note: The date of receipt of the demand for arbitration with the AAA will be used to calculate refunds of filing fees for both claims and counterclaims.

Hearing Room Rental

The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the AAA for availability and rates.

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Caution
As of: January 15, 2015 11:21 AM EST

Heartland Premier v. Group B & B

Court of Appeals of Kansas

September 14, 2001, Opinion Filed

No. 85,755

Reporter
29 Kan. App. 2d 777; 31 P.3d 978; 2001 Kan. App. LEXIS 870

HEARTLAND PREMIER, LTD., Appellant, v. GROUP B AND B, L.L.C., Appellee.

Prior History: [***1] Appeal from Johnson District Court; THOMAS E. FOSTER, judge.

Disposition: Affirmed in part, reversed in part, and remanded with directions.

Syllabus

1. Generally, when parties have agreed to be bound to a submission to arbitration, errors of law and fact or an erroneous decision of a matter submitted to the arbitrator are insufficient to invalidate an award that has been fairly made. Even though incorrectly decided, nothing that relates to the merits of the controversy is grounds for setting aside the award in the absence of fraud, misconduct, or other valid objection.

2. Courts generally seek to uphold arbitration agreements even where the contract provisions are somewhat uncertain and indefinite.

3. Arbitration agreements are construed by the usual rules and canons of contract interpretation.

4. Parties are presumed to contract with reference to presently existing statutes, ordinances, and regulations. Thus, unless a contrary intention is shown, all existing applicable or relevant statutes, ordinances, regulations, and settled law at the time of the contract become a part of the contract and must be read into it.

5. K.S.A. 5-410 is discussed and applied.

[***2] 6. Under the facts of this case, it is held that the arbitration clause included an award of attorney fees by the arbitrator, and K.S.A. 5-410 does not preclude such an award.

Counsel: Kurt S. Brack and Richard J. Plouff, of Holbrook, Heaven & Osborn, P.A., of Merriam, for appellant.

Thomas W. Harris, of Roeland Park, for appellee.

Judges: Before ELLIOTT, P.J., GERNON, J., and WAHL, S.J.

Opinion by: GERNON

Opinion

[*777] [**979] GERNON, J.: This appeal concerns a district court's

order which vacated an arbitration award of attorney fees and motion for summary [*778] judgment. Heartland Premier, Ltd. (Heartland), the appellant, also appeals the trial court's denial of its application to confirm the arbitration award and its requests for costs and fees. Group B and B, L.L.C., (Group B) is the appellee.

Heartland entered into a redemption agreement with some of its shareholders to redeem their shares. The agreement contained an arbitration clause. Group B was formed after the execution of the redemption agreement, and there is no issue as to whether [**980] it is a proper party to the agreement and its arbitration clause.

The arbitration clause states:

"Arbitration. All disputes and controversies [***3] of every kind and nature between the parties to this agreement arising out of or in connection with this agreement as to the existence, construction, validity, interpretation or meaning, performance, non-performance, enforcement, operation, breach, continuance, or termination thereof shall be submitted to arbitration in accordance with the rules of the American Arbitration Association most closely applicable to the nature of the dispute considering the nature of the business of the parties. Any order rendered therein shall be final and binding on the parties and judgment may be entered thereon in any court of competent jurisdiction."

Group B, pursuant to the arbitration clause, filed a Demand for Arbitration with the American Arbitration Association (AAA). In the arbitration pleadings and prehearing briefs, both parties requested attorney fees.

The arbitrator denied all claims made by the parties but awarded Heartland a total of $ 15,177.98 for fees and expenses, $ 13,102.98 of which was for attorney fees. Group B paid a portion of the award but refused to pay the attorney fees.

Heartland filed a petition with the district court for confirmation of the arbitration award and for [***4] a judgment on the award. Heartland also requested an award of all costs and attorney fees incurred as a result of filing the petition and obtaining the judgment. Group B filed an application to vacate the award of attorney fees and motion for summary judgment on the grounds that the arbitrator exceeded his powers in awarding such fees.

The district court treated Group B's pleadings as a motion for summary judgment and adopted Group B's reasoning and position. The district court granted Group B's application to vacate the [*779] award and motion for summary judgment and denied Heartland's application to confirm the award, finding that the arbitrator exceeded his powers in awarding the attorney fees. In addition, the court denied Heartland's request for attorney

fees in seeking to confirm the award. Heartland appeals.

Heartland argues that the district court lacked authority to vacate the award. We agree.

Generally, when parties have agreed to be bound to a submission to arbitration, errors of law and fact, or an erroneous decision of a matter submitted to the arbitrator, are insufficient to invalidate an award that has been fairly made. Even though incorrectly decided, nothing in the award **[***5]** that relates to the merits of the controversy is grounds for setting aside the award in the absence of fraud, misconduct, or other valid objection. **Jackson Trak Group, Inc. v. Mid States Port Authority**, 242 Kan. 683, 689, 751 P.2d 122 (1988).

In requesting that the arbitrator's award be confirmed, Heartland stated in its petition to the district court that it came pursuant to K.S.A. 5-401 **et seq**. K.S.A. 5-411 states: "Upon application of a party, the court shall confirm an [arbitration] award, unless within the time limits . . . grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in K.S.A. 5-412 and 5-413." K.S.A. 5-412 states in pertinent part: "Upon application of a party, the court shall vacate an award where . . . the arbitrators exceeded their powers." K.S.A. 5-412(a)(3).

In its application to vacate the award and a motion for summary judgment, Group B maintained that the arbitrator exceeded the scope of his authority in awarding Heartland attorney fees. Heartland **[***6]** and Group B differed in their interpretation of the redemption agreement.

The task of the trial court was to interpret a written instrument. It is now our task also.

This dispute focuses on which version of the AAA Commercial Arbitration Rules applies. Heartland argues the 1999 version is applicable, while Group B contends the 1998 version applies.

In 1998, AAA Commercial Arbitration Rule 1 was entitled "Agreement of Parties" and stated:

[981]** **[*780]** "The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) or under its Commercial Arbitration Rules. **These rules and any amendment of them shall apply in the form obtained at the time the demand for arbitration or submission agreement is received by the AAA.** The parties, by written agreement, may vary the procedures set forth in the rules." (Emphasis added.)

The redemption agreement was executed in 1998. Group B made its demand for arbitration in March 1999. Based on the clear language of the 1998 AAA Commercial Arbitration Rules, specifically Rule

1, any amendment of the 1998 rules that was in effect in [***7] March 1999 would apply to the arbitration.

"Generally, courts seek to uphold arbitration agreements even where the contract provisions are somewhat uncertain and indefinite. Arbitration agreements are construed 'by the usual rules and canons of contract interpretation.'" [Citation omitted.] **City of Lenexa v. C.L. Fairley Constr. Co.**, 245 Kan. 316, 319, 777 P.2d 851 (1989).

Parties are presumed to contract with reference to presently existing statutes, ordinances, and regulations. **Steele v. Latimer**, 214 Kan. 329, 336, 521 P.2d 304 (1974). Thus, it is often said that all existing applicable or relevant and valid statutes, ordinances, regulations, and settled law at the time the contract was made become a part of the contract and must be read into it, unless a contrary intention is shown. 214 Kan. at 336. Applying this rule of contract interpretation, the 1998 AAA Commercial Arbitration Rules apply and must be read into the contract.

In 1998, Rule 43 of the AAA Commercial Arbitration Rules, entitled "Scope of Award," stated:

"The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the [***8] scope of the agreement of the parties, including, but not limited to, specific performance of a contract. The arbitrator shall, in the award, assess arbitration fees, expenses, and compensation as provided in Sections 48, 49, and 50 in favor of any party and, in the event that any administrative fees or expenses are due the AAA, in favor of the AAA."

Effective January 1, 1999, AAA Commercial Arbitration Rule 45 became the rule entitled "Scope of Award." Rule 45 included the [*781] language of the old Rule 43, but was amended to also state: "The award of the arbitrator(s) may include: . . . an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement." 1999 AAA Commercial Arbitration Rule 45(d).

We conclude that the arbitration clause of the redemption agreement included the action on attorney fees taken here. The district court erred when it set aside the arbitrator's award.

Heartland next argues that the district court erred in adopting Group B's reasoning that K.S.A. 5-410 prohibited the arbitrator from awarding attorney fees.

K.S.A. 5-410 states: "**Unless otherwise [***9] provided in the agreement to arbitrate**, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration shall be paid as provided in the award." (Emphasis added.) By incorporating the AAA rules into

the agreement, the parties "otherwise provided" that attorney fees may be included in the arbitrator's award. K.S.A. 5-410 does not preclude an award of attorney fees.

We reverse and remand with directions that the district court enter judgment on behalf of Heartland in the amount the arbitrator awarded for attorney fees, $ 13,102.98.

We affirm the denial of costs and fees associated with confirming the award in the district court.

⚠ Caution
As of: January 15, 2015 1:22 PM EST

Rose Constr., Inc. v. Raintree Dev. Co.

Court of Appeals of Tennessee, Western Section, at Jackson

December 31, 2001, Decided

No. W2000-01388-COA-R3-CV

Reporter
2001 Tenn. App. LEXIS 961; 2001 WL 1683746

ROSE CONSTRUCTION, INC. v. RAINTREE DEVELOPMENT COMPANY, LLC

Subsequent History: Subsequent appeal at, Remanded by Rose Constr. Co. v. Raintree Dev. Co., 2004 Tenn. App. LEXIS 758 (Tenn. Ct. App., Nov. 16, 2004)

Prior History: **[*1]** An Appeal from the Chancery Court for Shelby County. No. 110162-1. Walter L. Evans, Chancellor.

Disposition: Reversed and remanded with instructions.

Counsel: Christopher M. Caputo, Michael I. Less, and Clifton M. Lipman, Memphis, Tennessee, for the appellant, Rose Construction, Inc.

Larry E. Parrish, Memphis, Tennessee, for the appellee, Raintree Development, LLC.

Judges: HOLLY K. LILLARD, J., delivered the opinion of the court, in which ALAN E. HIGHERS, J., and DAVID R. FARMER, J., joined.

Opinion by: HOLLY K. LILLARD

Opinion

This is an arbitration case. The plaintiff construction company agreed to construct the defendant developer's planned development project. When disputes arose out of the parties' performance, they terminated the contract. The parties then entered into arbitration. The arbitration panel found in favor of the plaintiff for $ 974,068.00 plus interest, including a $ 250,000 award for attorney's fees. The plaintiff filed an action in the chancery court, seeking confirmation of the award. The defendant asked the chancery court to vacate the arbitration award. The trial court vacated the entire award, finding that the arbitration panel **[*2]** exceeded its authority in awarding attorney's fees. The plaintiff construction company appeals. We reverse, finding that the award of attorney's fees is authorized under the parties' contract, and remand the case for confirmation of the arbitration award *in toto*.

This is an appeal from the trial court's order vacating an arbitration award. On January 29, 1996, Rose Construction, Inc.

("Rose"), and Raintree Development Company, LLC ("Raintree"), entered into a construction agreement under which Rose agreed to construct the Raintree Planned Development Project ("the project") in Collierville, Tennessee. In Section 4.5.1 of the construction agreement, the parties agreed to arbitrate all controversies arising out of the contract "in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association" ("Arbitration Rules"). Rule L-6 of the Arbitration Rules provides that any award resulting from such arbitration may include "an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement." The parties agree that Rule L-6 is incorporated into the contract by reference.

After work **[*3]** on the project was substantially completed, disputes arose between the parties regarding change orders, the quality of the workmanship, and payments due. On October 9, 1997, Raintree terminated the contract. On October 15, 1997, Rose notified Raintree that Rose had terminated the contract on September 30, 1997 because of Raintree's failure to pay.

On October 29, 1997, Rose filed a demand for arbitration. On November 7, 1997, Rose filed suit against Raintree in the Shelby County Chancery Court to enforce a mechanic's lien it had previously filed. On November 26, 1997, Rose filed a motion to stay the litigation pending resolution of the previously filed arbitration demand. On August 11, 1998, despite Raintree's persistent attempts to resist arbitration, the trial court entered an order staying the litigation pending resolution of the arbitration proceedings.

On March 15, 1999, by certified letter, Rose notified Raintree that it intended to seek an award of attorney's fees under the Tennessee Prompt Pay Act. ***See*** Tenn. Code Ann. § 66-34-101, *et seq.* (1993 & Supp. 2001) ("The Act"). From March 29 to April 19, 1999, the arbitration panel [1] **[*4]** conducted the arbitration proceedings. At the arbitration hearing, Rose argued that it was entitled to attorney's fees under the Act because of Raintree's bad faith. On April 6, 1999, the arbitration panel entered an order permitting Rose to introduce evidence on that issue.

On June 21, 1999, the arbitration panel issued an award in favor of Rose. The panel ordered Raintree to pay Rose the following: (1) $ 789,068 for construction costs, (2) $ 60,000 for a pass- through claim of a Rose subcontractor, (3) $ 250,000 in attorney's fees under the Prompt Pay Act, and (4) pre-award and post-award interest at a rate of ten percent (10%). The arbitration panel also determined that Raintree was entitled to a credit of $ 125,000 for work remaining on the project, making

[1] The panel members were Lewis H. Conner, Jr., David K. Taylor, and Edwin Rodgers.

the total amount awarded to Rose $ 974,068.00 plus interest.

On June 25, 1999, Rose filed a motion in chancery court for summary judgment and to confirm the award of the [*5] arbitration panel. On August 11, 1999, Raintree filed its own motion for summary judgment, arguing that the award should not be confirmed. On November 30, 1999, Raintree filed a memorandum with the chancery court arguing, *inter alia*, that the arbitration award should be vacated in its entirety because the arbitration panel exceeded its authority in awarding attorney's fees.

On the same date, November 30, 1999, the trial court conducted a hearing on whether to confirm or vacate the award of the arbitration panel. At the hearing, the trial judge stated that "this court in reading *Arnold v. Morgan Keegan & Co.*, 914 S.W.2d 445 (Tenn. 1996), is satisfied that the court cannot vacate an award due to an error of law or error of fact or because it disagrees with the arbitrators." The trial court then expressed its intent to "on its own motion modify the award to exclude the award of attorney's fees. And the Court will confirm all the other aspects of the award." However, no order was entered as a result of that hearing.

Thereafter, the trial court sent counsel for the parties its proposed findings of fact and conclusions of law. On March 3, 2001, the trial court [*6] conducted a hearing to address the comments and concerns of the parties on the proposed findings. Subsequently, on March 30, the trial court issued an Order and a detailed Memorandum of Law, changing its original position and vacating the entire arbitration award. In its Memorandum, the trial court found that the parties had entered into a valid arbitration agreement, but that "there is no basis or foundation in the enumerated language of the contract which allows for the award of attorney fees in the event of arbitration." The trial court therefore held that the award of attorney's fees to Rose "goes outside and beyond the arbitration agreement" itself. With respect to Rose's assertion that the Prompt Payment Act authorized such relief, the trial court found that the Act applied "only in a 'chancery court' lawsuit," and that the Act was "clearly not applicable" in arbitration proceedings. (Emphasis in original). Moreover, the trial court held that Tennessee Code Annotated § 29-5-311 prohibits the award of attorney's fees in arbitration proceedings unless such relief is provided for in the arbitration agreement. Finally, the trial court held that Raintree's [*7] due process rights were violated because Raintree was not given sufficient notice of Rose's intent to seek attorney's fees, and because the arbitration panel failed to issue a ruling before the commencement of the hearing that Rose was entitled to seek attorney's fees. The trial court

then vacated the entire arbitration award because "the award of attorney fees under the Prompt Pay Act by the arbitrators constituted more than just a mere error in construing the prevailing law, but was a complete failure to apply the law or the contract." From this order, Rose now appeals.

Tennessee has adopted the Uniform Arbitration Act, Tennessee Code Annotated § 29-5-301 *et seq.* (2001) which governs the scope of our review. ***See D & E Constr. Co. v. Robert J. Denley Co.***, 38 S.W.3d 513, 518 (Tenn. 2001); ***Arnold v. Morgan Keegan & Co.***, 914 S.W.2d 445, 448 (Tenn. 1996). The role of the trial and appellate court in **[*8]** reviewing the decision of an arbitrator is quite limited. The decision of the arbitration panel will be set aside "only in very unusual circumstances." ***Arnold***, 914 S.W.2d at 448 (quoting ***First Options of Chicago, Inc. v. Kaplan***, 514 U.S. 938, 942, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1995)). Under ***Arnold***, the court is required to utilize a "deferential" standard of review. The court is "not permitted to consider the merits of an arbitration award even if the parties allege that the award rests on errors of fact or misrepresentations of the contract." 914 S.W.2d at 450. We must accept the facts as determined by the arbitration panel unless we find that those facts are clearly erroneous, and legal issues should be reviewed "in a manner designed to minimize the interference with an efficient and economical system of alternative dispute resolution." ***Id.***

Under the Uniform Arbitration Act, the trial court may vacate the award of the arbitration panel if, among other reasons, "the arbitrators exceeded their **[*9]** powers" in making the award. Tenn. Code Ann. § 29-5-313(a)(3). "Arbitrators exceed their powers when the issue that they decide is not within the scope of the agreement to arbitrate." ***D & E Constr.***, 38 S.W.3d at 518. The trial court may modify or correct the award when "the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted." Tenn. Code Ann. § 29-5-314; ***see D & E Constr.***, 38 S.W.3d at 518.

Under Tennessee law, generally, the prevailing party may not recover attorney's fees incurred in arbitration unless the parties' contract provides for such recovery. ***See D & E Constr.***, 38 S.W.3d at 519-20. In this case, the parties dispute whether their contract provides for such recovery.

The trial court below found that the parties' contract contained no provision regarding attorney's fees. However, Section 4.5.1 of the contract **[*10]** incorporates by reference Rule L-6 of the Arbitration Rules. As noted above, Rule L-6 provides that an arbitration award may include "an

award of attorneys' fees if . . . it is authorized by law or [the parties'] arbitration agreement." On appeal, Rose argues that attorney's fees in this case are "authorized by law" under the Prompt Pay Act, Tennessee Code Annotated § 66-34-602(b). Generally, the Act provides for certain remedies to owners, contractors, and subcontractors arising out of the nonpayment for services rendered. ***See*** Tenn. Code Ann. § 66-34-602 ; *see also* ***Wasco, Inc. v. R. P. Indus.***, 1994 Tenn. App. LEXIS 765, No. 01- A-01-9407-CH00343, 1994 WL 706663, at*3 (Tenn. Ct. App. Dec. 21, 1994) (holding that § 66-34-602(b) provides for attorney's fees for the prevailing party in construction disputes). With respect to attorney's fees, the Act states that "reasonable attorney's fees may **[*11]** be awarded against the nonprevailing party; provided that such nonprevailing party has acted in bad faith." Tenn. Code Ann. § 66-34-602(b).

In this case, the arbitration panel held that it was authorized under the contract by Rule L-6 to include attorney's fees in its award. The panel found that Raintree had acted in bad faith and, based on this finding, concluded that Rose was entitled to recover attorney's fees under the Act. The panel found that, because Rose was entitled to recover under the Act, its entitlement to attorney's fees was "authorized by law," and consequently, attorney's fees were recoverable under the arbitration contract.

Raintree argues that the recovery of attorney's fees is not authorized by the incorporation of Rule L-6 into the contract. Raintree asserts that the issue is governed by Tennessee Code Annotated § 29-5-311, not the Prompt Pay Act, because the statutes are inconsistent and § 29-5-311 more specifically addresses the issue of attorney's fees in arbitration proceedings. Section 29-5-311 provides: **[*12]** "Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award." Tenn. Code Ann. § 29-5-311. In ***D & E Construction***, the Tennessee Supreme Court interpreted this statute as meaning "clearly and unambiguously that attorney's fees are *not* to be awarded for work performed in arbitration proceedings absent the parties' understanding to the contrary." ***D & E Constr.***, 38 S.W.3d at 519 (emphasis in original). Raintree argues that the reasoning used by the arbitration panel, and argued on appeal by Rose, is circular: Rule L-6 allows for the recovery of attorney's fees where authorized by law, but the applicable law (§ 29-5-311) allows for the recovery of attorney's fees if they are provided for in the contract. Thus, Raintree claims, Rose's claim to attorney's fees under Rule L-6 is untenable.

After review of the statutes, we find that **[*13]** § 29-5-311 and §

66-34-602(b) are not inconsistent. Rather, § 29-5-311 effectively restates part of the language in Rule L-6 which, consistent with Tennessee case law, provides that attorney's fees are available in arbitration proceedings if such recovery "is authorized by . . . the arbitration agreement." "Contractual terms should be given their ordinary meaning . . . and should be construed harmoniously to give effect to all provisions and to avoid creating internal conflicts." ***Wilson v. Moore***, 929 S.W.2d 367, 373 (Tenn. Ct. App. 1996). Therefore, giving effect to § 29-5-311 is consistent with the terms of the contract and does not operate to negate the effect of § 66-34-602(b).

Under Rule L-6, we must now determine whether the recovery of attorney's fees in this case was "authorized by law" and, thus, allowable under the contract. This Court has recognized that § 66-34-602(b) of the Prompt Pay Act "specifically **[*14]** provides for [attorney's fees] against the nonprevailing party in a dispute of this kind." ***Wasco***, 1994 Tenn. App. LEXIS 765, 1994 WL 706663, at*3. ***Wasco*** involved an arbitration proceeding over payments for construction work. ***Wasco*** held that § 66-34-602 was a part of the original contract, and that the prevailing party was entitled to fees under that statute. The Court reasoned that "laws affecting either the construction, enforcement or discharge of a contract which subsist at the time and place of the making of a contract and where it is to be performed, enter into and form a part of it as fully as if they had been expressly referred to or incorporated in its terms." ***Id.*** The arbitrator's award of fees was therefore upheld under the Act, even though there was no explicit finding of bad faith. The ***Wasco*** court stated that, in light of the deference to be afforded an arbitration award, it should be presumed that the arbitrator had found that the nonprevailing party had acted in bad faith. ***Id.***

Thus, since **[*15]** the arbitration panel in this case expressly found that Raintree acted in bad faith, Rose is in a stronger position to recover under the Act than the prevailing party in ***Wasco***. After a thorough review of the record, we must conclude that the panel's finding of bad faith was not clearly erroneous. Therefore, Rose's recovery for attorney's fees is authorized by law under § 66-34-602(b). The parties contractually agreed that attorney's fees could be awarded if such recovery was authorized by law. Consequently, the arbitration panel did not exceed its authority in including attorney's fees in its award.

The trial court found that the Prompt Pay Act was inapplicable because actions under the Act can only be brought in a chancery court. Section 66-34-602(a)(3) provides that the party seeking recovery under the Act "may, in

addition to all other remedies available at law or in equity, sue for equitable relief, including injunctive relief, for continuing violations of this chapter, in the chancery court of the county in which the real property is located." Tenn. Code Ann. § 66-34-602(a)(3) [*16] (emphasis added). Thus, the language is permissive rather than mandatory. This is in contrast to ***Vanderheyden v. Ajay, Inc.***, 1999 Tenn. App. LEXIS 531, No. 02 A01-9803-CH-00070, 1999 WL 562716 (Tenn. Ct. App. Aug. 2, 1999), in which this Court held that an agreement to arbitrate disputes over the owner's refusal to pay the retainage was unenforceable. The statute at issue in that case mandated that "the contractor . . . shall seek any remedy in a court of proper jurisdiction." ***Vanderheyden***, 1999 Tenn. App. LEXIS 531, 1999 WL 562716, at *4 (quoting Tenn. Code Ann. § 66-11-144(d) (emphasis added)). In the instant case, the Prompt Payment Act states merely that an aggrieved party "may" sue for relief in chancery court. ***See Williams v. McMinn County***, 209 Tenn. 236, 352 S.W.2d 430, 433 (Tenn. 1961) (recognizing that the term "may" in a statute connotes discretion or permission); ***Gabel v. Lerman***, 812 S.W.2d 580, 582 (Tenn. Ct. App. 1990) (noting that "shall" in a statute means mandatory); ***see also Board of County*** [*17] ***Comm'rs v. Taylor***, 1994 Tenn. App. LEXIS 452, No. 93-1490- I, 1994 WL 420922, at *4 (Tenn. Ct. App. Aug. 12, 1994) (comparing the different meanings of "may" and "shall" in statutes). Thus, a suit in chancery court is not the exclusive remedy for recovery of attorney's fees under the Act. [2]

[*18] The trial court also found that Raintree's due process rights were violated. Assuming *arguendo* that due process considerations are implicated in a dispute between private parties, we must conclude that any due process rights of Raintree in these proceedings were well protected. Almost two weeks prior to the arbitration proceeding, Rose sent Raintree a certified letter stating its intention to seek fees under the Prompt Payment Act. Raintree was also notified by the arbitration panel that Rose sought attorney's fees under the Act when the panel agreed to hear evidence from Rose on the issue. From a review of the transcript of the proceedings, Raintree was put on sufficient notice that Rose would be offering proof of its expenses but that the arbitration panel would defer ruling on the issue of whether it would award those amounts. The arbitration panel found that the

[2] A contrary finding on this issue would require this court to also find that the entire arbitration proceeding below was effectively "preempted" by the Prompt Pay Act, because suits for recovery of payments on construction contracts would have to be brought in chancery court, the court of exclusive jurisdiction. Neither party takes this position, because the result would be that arbitration agreements in all construction contracts would essentially be unenforceable. For this additional reason, we reject the position of Raintree and the trial court that suits to recover under the Prompt Pay Act must be brought in chancery court.

notice Rose gave was adequate, and that finding is not clearly erroneous. Raintree never requested a continuance to prepare a defense on this issue, and it stipulated that it was not prejudiced by any failure to receive earlier notice. Under these circumstances, the trial court's finding on this issue must be reversed.

[*19] Finally, we note that the facts in this case are distinguishable from those in ***D & E Construction***. In that case, the contract clearly precluded an award of attorney's fees in arbitration proceedings. ***D & E Constr.***, 38 S.W.3d at 519. In the instant case, however, because the contract incorporates by reference Rule L-6, the arbitration panel is authorized by the contract to award attorney's fees. Therefore, we need not reach the issue of severability. [3]

[*20] Therefore, the order of the trial court vacating the arbitration award is reversed. The arbitration award must be confirmed in its entirety, and the cause is remanded for this purpose.

The decision of the trial court is reversed and remanded for further proceedings consistent with this Opinion. Costs are taxed to Appellee, Raintree Development Company, LLC, for which execution may issue if necessary.

HOLLY K. LILLARD, JUDGE

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[3] Raintree devotes a significant part of its brief arguing that the trial court erred in staying the court proceedings pending arbitration. This court has twice rejected appeals based on that argument, first in an order dated August 21, 1998, and again in an order dated August 24, 2000. In both orders, we recognized that an order compelling arbitration is not appealable as of right, and we declined to entertain Raintree's appeal of that issue. ***See*** Tenn. Code Ann. § 29-5-319; ***see also Southeast Drilling and Blasting Servs., Inc. v. BRS Constr. Co.***, 1997 Tenn. App. LEXIS 490, No. 01 A01-9706-CH-00272, 1997 WL 399387, at *2 n.4 (Tenn. Ct. App. July 16, 1997) (recognizing that an order compelling arbitration is not appealable as of right). Therefore, we decline to address the propriety of the trial court's ruling compelling arbitration under the circumstances of this case.

Caution
As of: January 15, 2015 1:07 PM EST

Winkelman v. Kraft Foods, Inc.

Court of Appeals of Wisconsin

January 27, 2005, Dated ; January 27, 2005, Filed

03-2355

Reporter
2005 WI App 25; 279 Wis. 2d 335; 693 N.W.2d 756; 2005 Wisc. App. LEXIS 76

In re the Arbitration between John W. Winkelman, Petitioner-Appellant-Cross-Respondent v. Kraft Foods, Inc., Respondent-Respondent-Cross-Appellant

Subsequent History: Review denied by *Winkelman v. Kraft Foods, Inc., 2005 WI 134, 282 Wis. 2d 720, 700 N.W.2d 272, 2005 Wisc. LEXIS 432 (2005)*

Prior History: APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge.

Disposition: *Affirmed in part; reversed in part and cause remanded with directions.*

Counsel: On behalf of the petitioner-appellant-cross-respondent, the cause was submitted on the briefs of *Jacob P. Westerhof* and *Cari Anne Renlund* of *DeWitt Ross & Stevens, S.C.*, Madison.

On behalf of the respondent-respondent-cross-appellant, the cause was submitted on the briefs of *Roy L. Prange, Jr.* of *Quarles & Brady, LLP*, Madison.

Judges: Before Deininger, P.J., Dykman and Lundsten, JJ.

Opinion by: DEININGER

Opinion

[*P1] [340] [***758]** DEININGER, P.J. John Winkelman appeals a judgment that confirmed his right to recover compensatory damages awarded him by an arbitrator but denied his recovery of punitive damages and attorney fees that the arbitrator also awarded. Kraft Foods, Inc., cross-appeals, claiming that the circuit court should have set aside the arbitrator's award in its entirety. We conclude that the arbitrator did not exceed her powers or perversely misconstrue the law in awarding Winkelman the amounts that she did. Accordingly, all aspects of the arbitration award should have been confirmed. We therefore affirm in part, reverse in part and direct that, on remand, judgment be entered in Winkelman's favor for compensatory and punitive damages, and for attorney fees, all as awarded by the arbitrator. We deny, however, Winkelman's request for an order requiring Kraft to pay his reasonable attorney fees for the post-arbitration litigation.

BACKGROUND

[*P2] The dispute in this case arose out of a forward pricing contract whereby Winkelman agreed to sell "the entire output of milk" produced on his farm to Kraft, at a price determined under the contract, for a period of one year. The contract provided, among other things, that disputes arising under the parties' contract were to be arbitrated. The arbitration provision read as follows:

> Any disputes arising under this agreement will be resolved by binding arbitration pursuant to the rules of **[**341]** the American Arbitration Association, before a single arbitrator, in a mutually convenient location in the State of Wisconsin.

[*P3] **[***759]** Early in the contract year, milk prices rose substantially, and Winkelman sought to be released from the contract. Kraft refused to cancel the contract, threatening to sue him for damages if he breached the contract and to sue any milk purchasers who bought his milk during the balance of the contract year. Winkelman continued to provide all of his milk to Kraft for the remainder of the contract year, but he demanded arbitration of his claim that Kraft should have allowed him to terminate the contract for a minimal penalty when he requested it. Specifically, he alleged the following:

> The Nature of the Dispute: We were told by [Kraft's agent] that if price of milk dropped [sic] we could quit shipping milk to Kraft. We would lose 1 months [sic] premiums & that would be that. He lied to get us to sign.
>
> The Claim for Relief Sought: $ 45,237.37 plus Nov & Dec milk.

[*P4] In a preliminary ruling, the arbitrator allowed Winkelman to amend his claim to add requests for punitive damages and reasonable attorney fees in addition to compensatory damages. The arbitrator permitted the amendment after concluding that Winkelman's additional claims were permitted under "the language of the parties' Contract, the provisions of the AAA [American Arbitration Association] Commercial Arbitration Rules ... and ... Wisconsin Statutory law which permit the awarding of attorneys fees and costs where the making of fraudulent representations has been proven and an award of punitive damages in certain cases." The parties stipulated to compensatory **[**342]** damages in the amount of $ 44,056.68 should Winkelman prevail on his claim that Kraft fraudulently induced him to enter into the forward pricing contract.

[*P5] The arbitrator found that Kraft's agent had in fact misrepresented to Winkelman and other farmers that "they could get out of the contract with one month's penalty." She concluded:

> The evidence and testimony in this case supports a conclusion that ... [an] agent

> and employee of Kraft Foods, Inc., misrepresented the Kraft forward pricing contract for 2001 to the Claimant. Mr. Winkelman relied upon [the agent]'s representations to his detriment and is, therefore, entitled to be made whole for his loss. He is entitled to an award for his attorney's fees and all costs of this arbitration. There is also support for a conclusion that various Kraft employees, on behalf of the Corporation, acted in reckless disregard of Mr. Winkelman's rights under his contract with Kraft, supporting an award of punitive damages in this case. The Contract between the parties, the Rules which apply to the conduct of this matter together with Wisconsin statutory and case law provide the Arbitrator with authority to make these awards.

As to her authority to award attorney fees, the arbitrator cited the AAA Rules agreed to by the parties, which provide for "an award of attorneys' fees if ... it is authorized by law," and Wis. Stat. § 100.18(11)(b) (2003-04), [1] which permits "reasonable attorney fees" to be awarded to someone who incurs pecuniary loss because of a violation of that statute. Regarding punitive damages, the arbitrator relied on the arbitration rule authorizing her to "grant any remedy or relief that **[**343]** the arbitrator deems just and equitable and within the scope of the agreement of the parties," and the absence of any Wisconsin law prohibiting **[***760]** an award of punitive damages in arbitration proceedings.

[*P6] The arbitrator granted Winkelman the stipulated sum ($ 44,056.68) as compensatory damages, double that amount ($ 89,313.36 [sic]) as punitive damages, his costs ($ 5,750), and attorney fees in the amount of $ 27,333.95. Winkelman commenced an action in Dane County Circuit Court to confirm the arbitrator's award. The circuit court confirmed the compensatory damage award but concluded that the arbitrator "exceeded her authority in awarding attorneys' fees ... pursuant to Wis. Stat. § 100.18" and "in awarding punitive damages." The court entered judgment in Winkelman's favor for the compensatory damages and costs the arbitrator had awarded, together with interest "at the legal rate of 5 percent" from the date of the arbitrator's awards. Winkelman appeals the circuit court's failure to confirm the punitive damages and attorney fees awards, and Kraft cross-appeals the court's confirmation of the compensatory damage award.

ANALYSIS

[*P7] We review the arbitrator's award de novo and decide independently whether the

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. The relevant provisions of Wis. Stat. § 100.18 are quoted at footnote 2, below.

arbitrator's award should be confirmed in whole or in part, owing no deference to the circuit court's conclusions. *See* City of Madison v. Local 311, ***Int'l Ass'n of Firefighters, AFL-CIO***, 133 Wis. 2d 186, 190, 394 N.W.2d 766 (Ct. App. 1986). Our review of an arbitration award is highly deferential; we may disturb the award only if we conclude the arbitrator committed one of a limited **[**344]** number of transgressions. *See* City of Madison v. Madison Prof'l Police Officers Ass'n, 144 Wis. 2d 576, 586, 425 N.W.2d 8 (1988) ("[T]he court will not overturn the arbitrator's decision for mere errors of law or fact, but only when 'perverse misconstruction or positive misconduct [is] plainly established, or if there is a manifest disregard of the law, or if the award itself is illegal or violates strong public policy.'") (citation omitted).

[*P8] Thus, we are not to substitute our judgment for that of the arbitrator, Milwaukee Teachers' Education Association v. Milwaukee Board of School Directors, 147 Wis. 2d 791, 795, 433 N.W.2d 669 (Ct. App. 1988), and we may vacate an award only if it violates the foregoing common law standards or those established by statute. *See* Lukowski v. Dankert, 184 Wis. 2d 142, 150-51, 515 N.W.2d 883 (1994). The statutory standards for vacating an arbitrator's award are as follows:

> In either of the following cases the court in and for the county wherein the award was made must make an order vacating the award upon the application of any party to the arbitration:
>
> (a) Where the award was procured by corruption, fraud or undue means;
>
> (b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;
>
> **[**345]** (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

Wis. Stat. § 788.10(1).

[*P9] In short, an arbitrator's award comes before us clothed with a presumption that it should be confirmed, and Kraft bears a heavy burden in attempting to convince us **[***761]** that any of the amounts the arbitrator awarded to Winkelman should be set aside. *See* DeBaker v. Shah, 194 Wis. 2d 104, 112, 117, 533 N.W.2d 464 (1995).

Arbitrator's Award of Attorney Fees

[*P10] Kraft first claims that the arbitrator exceeded her powers in awarding attorney fees under Wis. Stat. § 100.18. [2] This is so, according to Kraft, because the statute does not apply to commercial transactions **[**346]** such as the forward pricing contract for milk at issue in this case, Winkelman was not "the public" as the statute requires, there was no "sales promotion" or "sale of services" by Kraft and milk is not "merchandise." For good measure, Kraft also asserts that the arbitrator perversely misconstrued the law and manifestly disregarded it when she relied on § 100.18 to award Winkelman attorney fees. It offers no additional authority or analysis for these latter propositions, however, relying instead on its earlier "exceeded its authority" arguments. Kraft also argues that an arbitrator cannot award attorney fees for a violation of § 100.18 because the statute allows only "a court of competent jurisdiction" to do so.

[*P11] Kraft's argument regarding the arbitrator's application of Wis. Stat. § 100.18 is, essentially, that the arbitrator got it wrong. Even if that is so, however, we cannot set aside the award for "mere errors of law or fact." *Madison Prof'l Police Officers Ass'n*, 144 Wis. 2d at 586. Winkelman took his claim against Kraft to an arbitrator because Kraft's standard form contract required him to do so. The parties having thus contracted to arbitrate any disputes between them arising from the forward pricing contract, our role "is essentially supervisory, with the goal of assuring that the parties are getting the arbitration that they contracted for.... [T]he parties get the arbitrator's award, whether that award is correct or incorrect as a matter of fact or law." *Id.* at 585-86 (citation omitted). Court proceedings to confirm an arbitrator's award do not provide a forum for a losing party to re-litigate the issues decided by the arbitrator, and we will not vacate the present award unless Kraft convinces us that the arbitrator deliberately disregarded the law. *See* Lukowski v. Dankert, 178 Wis. 2d 110, 115, **[**347]** 503 N.W.2d 15 (Ct. App. 1993), *affirmed*,

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[2] Wisconsin Stat. § 100.18(1) provides, as relevant here, as follows:

> No ... corporation ... or agent or employee thereof, with intent to ? induce the public in any manner to enter into any contract or obligation relating to the purchase [or] sale ... of any ... merchandise ... shall make, ... or cause, directly or indirectly, to be made ... in this state ... in any ... way ... [a] statement or representation of any kind to the public relating to such purchase [or] sale ... or to the terms or conditions thereof, which ... statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

Section 100.18(11)(b) provides that any "person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable attorney fees."

184 Wis. 2d 142, 515 N.W.2d 883 (1994). Kraft has failed to convince us that the arbitrator did so.

[*P12] First, as to the scope of the arbitrator's powers, nothing in the terse arbitration provision of the parties' contract limits the relief or remedies an arbitrator may grant. The arbitration rules to which the parties agreed provide that the arbitrator "shall have the power to rule on his or her own jurisdiction, including any objections with respect to the ... scope ... of the arbitration agreement." Thus, the arbitrator plainly was within her right to rule on Winkelman's motion to have his **[***762]** claims for punitive damages and attorney fees arbitrated. Similarly, her reliance on the arbitration rule granting her the authority to award attorney fees if "it is authorized by law," and her reliance on a Wisconsin statute for such authority, were within the scope of the powers these parties agreed to confer on the arbitrator by way of the rules they adopted.

[*P13] Thus, we turn to Wis. Stat. § 100.18 and case law interpreting it to see if the arbitrator's application of it to the present facts may be deemed a perverse misconstruction or manifest disregard of the law. We agree with Winkelman that, because some courts have concluded that § 100.18(1) may be applied in a commercial setting (that is, that the statute does not apply exclusively to the consumer protection arena as Kraft argues), the arbitrator did not act "perversely" in applying it here. The supreme court concluded in *Gorton v. American Cyanamid Co.*, 194 Wis. 2d 203, 533 N.W.2d 746 (1995), that the circuit court had not erred in permitting a farm partnership to recover attorney fees under § 100.18 from a pesticide company that had **[**348]** violated the statute. *See id.* at 232. The U.S. District Court for the Western District of Wisconsin cited *Gorton* for the proposition that Wisconsin courts have applied § 100.18 to "commercial entities," rejecting a claim similar to Kraft's that the statute governs only transactions involving "consumers." *See* ***Stoughton Trailers, Inc. v. Henkel Corp.***, 965 F. Supp. 1227, 1236-37 (W.D. Wis. 1997).

[*P14] That Kraft made misrepresentations to "the public" within the meaning of Wis. Stat. § 100.18 also finds support in Wisconsin law. We recently reaffirmed that "the public" can consist of only one person, the key factor being whether the allegedly fraudulent or deceptive statements were made prior to the recipient's entering into a contractual relationship with the maker of the statements. *See* ***Kailin v. Armstrong***, 2002 WI App 70, P44, 252 Wis. 2d 676, 643 N.W.2d 132 (citing *State v. Automatic Merchandisers of Am., Inc.*, 64 Wis. 2d 659, 664, 221 N.W.2d 683 (1974)). Here, the arbitrator found that Kraft's agent misrepresented to Winkelman, and to other farmers, that the forward pricing contract could be

terminated at any time for a minimal penalty, and that these statements occurred before Winkelman agreed to sign the contract.

[*P15] Finally, Kraft's claims regarding the absence of (1) a "sales promotion," (2) the "sale of services" by Kraft, and (3) "merchandise," are similarly of no avail. Kraft cites no legal authority whatsoever for its arguments in these regards, and we therefore fail to see how these arguments show that the arbitrator perversely misconstrued or disregarded Wisconsin law. In any event, because the arbitrator found that Kraft's misrepresentations induced Winkelman to enter into a contract to sell his milk to Kraft, we see nothing in the language of Wis. Stat. § 100.18(1) that would render it **[**349]** inapplicable here. Put another way, we see no reason why the seller of a product who is fraudulently induced by a buyer's misrepresentation to contract for its sale on terms advantageous to the buyer should be any less worthy of protection under the statute than a buyer who is induced by a seller's falsehood into overpaying for a product or service. *See* § 100.18(1) ("No ... corporation ... or agent or employee thereof, with intent to ... induce the public in any manner to enter into *any contract* or obligation *relating to the purchase [or] sale* ... of any ... merchandise ...." (emphasis added)).

[*P16] Wisconsin courts have typically interpreted the scope of Wis. Stat. § 100.18 broadly, not narrowly. *See, e.g.*, *Dorr v. Sacred Heart Hosp.*, 228 Wis. 2d 425, 445, **[***763]** 597 N.W.2d 462 (Ct. App. 1999) ("Section 100.18 prohibits deceptive, misleading, or untrue statements of any kind to the public made in a commercial setting, no matter how made."). Thus, even though Kraft offers plausible arguments that the arbitrator may have erred in its application of § 100.18 to the present dispute, we cannot conclude that the arbitrator's construction of § 100.18 was perverse, or that she manifestly disregarded the law in relying on the statute to award reasonable attorney fees to Winkelman. As we have discussed, some support can be found in Wisconsin case law for the arbitrator's interpretation. *See Lukowski*, 184 Wis. 2d at 153 ("[A]n arbitrator cannot be said to have manifestly disregarded the law if substantial authority sustains the arbitrator's assumption as to the law.").

[*P17] Kraft also contends that the arbitrator exceeded her powers or manifestly disregarded the law because recoveries under Wis. Stat. § 100.18 may be had only in a "court of competent jurisdiction." Section 100.18(11)(b)2. **[**350]** We note again that Winkelman's dispute with Kraft was decided by an arbitrator instead of a court only because Kraft's standard form contract so required. As we have also explained, the rules the parties agreed to permitted the arbitrator to award attorney fees if "authorized by law," and the

arbitrator looked to Wisconsin substantive law to determine whether attorney fees could be awarded on the present facts. Her authority to award the fees thus derived from the parties' contract and the rules it adopted, not directly from the statute itself. The only role the statute played was to demonstrate that Wisconsin substantive law authorizes attorney fees to be awarded when a party is induced by another's misrepresentations to enter into a contract.

[*P18] Kraft next points to *Finkenbinder v. State Farm Mutual Auto Insurance Co.*, 215 Wis. 2d 145, 572 N.W.2d 501 (Ct. App. 1997), and *Milwaukee Teachers' Education Association*, 147 Wis. 2d 791, 433 N.W.2d 669, in support of its claim that an arbitrator may award attorney fees only if expressly authorized to do so by the parties' contract. The case law Kraft cites is unavailing. We decided in *Finkenbinder* that a party could not obtain a circuit court order for costs under Wis. Stat. § 814.01 after being awarded damages by an arbitrator. ***Finkenbinder***, 215 Wis. 2d at 151-52. We did *not* say, or even imply, that an arbitrator could not rely on Wisconsin statutes in determining whether to award costs to a party who prevailed in the arbitration proceeding. Similarly, we concluded in *Milwaukee Teacher's* that, in the absence of express authority in the arbitration agreement, an arbitrator may not award attorney fees as that would "substantially erode Wisconsin's long adherence to the American rule, which holds that 'absent statute or enforceable contract, litigants pay **[**351]** their own attorneys' fees.'" *Milwaukee Teacher's Educ. Ass'n*, 147 Wis. 2d at 795 (citation omitted). Here, as we have explained, the parties' contract, via the rules it adopts, permits an attorney fees award if "authorized by law." In this case, that authority is supplied by Wis. Stat. § 100.18, which in turn also satisfies the exception to the American Rule allowing fee shifting if a statute provides for it.

[*P19] In sum, Kraft has failed to meet its burden to convince us that, in awarding attorney fees to Winkelman, the arbitrator exceed her powers, or that, by doing so, she perversely misconstrued or deliberately ignored Wisconsin law.

Arbitrator's Award of Punitive Damages

[*P20] We turn next to Kraft's claim that the arbitrator exceeded her powers by awarding Winkelman punitive damages. **[***764]** Kraft's claim is considerably weakened by its acknowledgement that "whether an Arbitrator has the power to award punitive damages in the absence of an express agreement has not been decided in Wisconsin." We have previously explained that when "no Wisconsin case has addressed" a specific issue, an arbitrator is "free to fill the interstices in the existing relevant law." *Lukowski*, 178 Wis. 2d at 116. In other words, so long as the arbitrator did not

unreasonably conclude that, under the arbitration rules the parties agreed to, she was empowered to award punitive damages, that conclusion cannot be said to perversely misconstrue or manifestly disregard Wisconsin law that does not exist.

[*P21] The arbitrator's chief justification for her authority to award punitive damages is the AAA rule providing that an arbitrator "may grant any remedy or **[**352]** relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties." The U.S. Supreme Court has concluded that similarly open-ended language ("arbitrators may award 'damages and other relief'") in agreed-upon arbitration rules supports a conclusion that the parties authorized their arbitrator to award punitive damages, especially when, as in this case, the party against whom punitive damages were awarded had drafted the parties' standard-form contract. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-63, 131 L. Ed. 2d 76, 115 S. Ct. 1212 (1995). Even though *Mastrobuono* involved the Federal Arbitration Act, the Court's rationale is persuasive on the present facts. *See Diversified Mgmt. Servs., Inc. v. Slotten*, 119 Wis. 2d 441, 446, 351 N.W.2d 176 (Ct. App. 1984) ("Federal cases construing the federal act ... are persuasive authority for our interpretation of sec. 788.10.").

[*P22] We thus conclude that the arbitrator did not perversely misconstrue the law or the parties' contract, and neither did she manifestly disregard controlling law, by concluding that she was authorized to award punitive damages. We briefly address Kraft's remaining arguments to the contrary.

[*P23] Kraft notes that "[s]ix other arbitrators, in related cases involving the same form contract, the same alleged statements from Kraft's employee ... and the same behavior by Kraft, rejected claims for punitive damages and attorneys' fees." Our response to this information is twofold. First, the fact that other arbitrators in similar cases "rejected claims for punitive damages" does not necessarily mean that those arbitrators concluded that they were not empowered to award them—they may have concluded that the claimants in those cases did not make the proper showing to be **[**353]** awarded punitive damages. Moreover, even if the other arbitrators determined, contrary to this arbitrator's conclusion, that they could not award punitive damages, that fact, by itself, does not mean that they were right and this arbitrator was wrong. Finally, as we have discussed, even if this arbitrator was wrong in concluding she could award punitive damages, we would not set aside the award unless she was "perversely" or "manifestly" wrong.

[*P24] In lieu of first presenting substantive arguments as to why we must conclude that the arbitrator in this case exceeded her powers in

awarding punitive damages, Kraft urges us, for policy reasons, to "adopt the approach taken" by the Illinois Court of Appeals in *Edward Electric Co. v. Automation, Inc.*, 229 Ill. App. 3d 89, 593 N.E.2d 833, 171 Ill. Dec. 13 (Ill. App. 1992). The Illinois court explained that courts in various jurisdictions have generally adopted one of three approaches to the **[***765]** issue of an arbitrator's power to award punitive damages: (1) arbitrators may award them unless the arbitration agreement provides otherwise; (2) private arbitrators may never award them because only the state may do so; or (3) arbitrators may award them if the arbitration agreement expressly so provides. *Id.* at 842-43. The Illinois Court of Appeals opted for the third approach on public policy grounds, finding it a workable compromise between the "dangers of allowing arbitrators to award punitive damages" arising from the limited and deferential standard for judicial review, and "the need for arbitrators to have the power to award full and complete relief." *Id.* at 843.

[*P25] We decline to make this policy choice for the state of Wisconsin. We are primarily an error-correcting court. *Jackson v. Benson*, 213 Wis. 2d 1, 18, 570 N.W.2d 407 (Ct. App. 1997), *reversed on other grounds*, 218 Wis. 2d 835, **[**354]** 578 N.W.2d 602 (No. 97-0270). Our role in this case is to determine whether the arbitrator violated any of the standards set forth in case law or Wis. Stat. § 788.10(1) that would require us to vacate her award or any part of it. The present arbitrator essentially adopted the first approach cited by the Illinois court in *Edward Electric*, which is also the rule largely embraced by federal courts under the Federal Arbitration Act: an arbitrator may award punitive damages if permitted to do so under the rules adopted by the parties, so long as the award is not otherwise proscribed by the parties' agreement. As we have noted, federal precedents under the Federal Arbitration Act are deemed persuasive in interpreting Wis. Stat. ch. 788. Accordingly, given our deferential standard of review, we find no basis for rejecting the arbitrator's determination that she was empowered by the rules agreed to in the parties' contract to entertain a claim for punitive damages. If Wisconsin is to depart from the federal approach on this issue and adopt some other rule, that policy choice must come from the legislature or the supreme court, not this court.

[*P26] We thus decline Kraft's invitation to consider several policy arguments it claims weigh in favor of adopting the conclusion of the Illinois Court of Appeals in *Edward Electric*. We turn, instead, to Kraft's remaining arguments that the arbitrator's decision that she could award punitive damages cannot be allowed to stand under present Wisconsin law. We find these arguments to be unpersuasive and largely repetitive.

[*P27] As its first substantive legal argument, Kraft contends that the parties' agreement does not permit an award of punitive damages because the language of their contract does not expressly provide for that remedy. This argument, however, is simply a **[**355]** restatement of Kraft's public policy argument that we should adopt the Illinois approach that precludes punitive damages in the absence of express contract authorization, instead of the federal rule that permits an award if the agreed upon rules do and the contract does not provide otherwise. We again decline the invitation.

[*P28] Kraft next argues that the AAA rule that the arbitrator relied on, which authorizes her to "grant any remedy or relief that [she] deems just and equitable and within the scope of the agreement of the parties," does *not* permit an award of punitive damages because the parties' contract does not authorize punitive damages as a remedy. In support, Kraft cites another Illinois precedent embracing the *Edward Electric* rule. We reject this third incarnation of Kraft's argument based on Illinois law.

[*P29] Next, in what is at best a slight variation of the same argument, Kraft asks **[***766]** us to reject the federal precedents, such as *Mastrobuono*, in favor of the more state-friendly *Edward Electric* approach. It cites cases from other states, most notably ***Garrity v. Lyle Stuart, Inc.***, 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976), a case discussed in *Mastrobuono*. Kraft asserts that a "majority" of state courts have adopted either the *Edward Electric* rule or the more restrictive *Garrity* approach, which is essentially an absolute prohibition against punitive damage awards in arbitration proceedings. *Garrity*, 353 N.E.2d at 796. We acknowledge that federal precedents, like those from other states, are not binding on us, and we do not view the Federal Arbitration Act as controlling in our present analysis. However, we are *not* here adopting the "federal approach" as the law in Wisconsin. Rather, we conclude only that the arbitrator's reliance on the federal precedents and her analysis of the scope of her authority under the parties' agreement was not a perverse **[**356]** misconstruction or deliberate defiance of present Wisconsin law. In the absence of controlling Wisconsin statutes or precedent to the contrary, we can reach no other conclusion.

[*P30] Kraft also contends that Wisconsin has, in effect, already adopted the *Edward Electric* approach. Kraft claims that, under the rationale of *Milwaukee Teacher's*, the absence of an express authorization in the arbitration agreement for punitive damages, like the absence of an express authorization for an award of attorney fees, is fatal to Winkelman's position. But, as we have explained in discussing the attorney fees issue, our conclusion

in *Milwaukee Teacher's* was that, because Wisconsin embraces the "American Rule," a prevailing party in arbitration cannot be awarded attorney fees unless a contract or statute authorizes fee shifting. In *Milwaukee Teacher's*, neither the parties' contract nor any statute provided for fee shifting, while here, the parties' contract, by way of the rules it adopted, permitted fee shifting if "authorized by law," and Wis. Stat. § 100.18 so authorizes.

[*P31] Similarly, the agreed-upon rule containing the broad "relief and remedies" language, under the rationale set forth in *Mastrobuono*, permitted the arbitrator to award punitive damages upon a proper showing of entitlement to them. Wisconsin Stat. § 895.85(3) provides that the "plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." The arbitrator determined that Kraft had acted maliciously and intentionally disregarded Winkelman's rights, thus, in her view, permitting an award of punitive damages to Winkelman. Kraft does not directly challenge the arbitrator's determination that Kraft acted **[**357]** maliciously and in intentional disregard of Winkelman's rights until its brief in the cross-appeal. We thus defer consideration of whether, if the arbitrator was in fact empowered to award punitive damages, she nonetheless perversely misconstrued the law in doing so. For present purposes, we conclude only that the arbitrator was legally empowered to award punitive damages because nothing in Wisconsin law, including our holding in *Milwaukee Teacher's*, prohibits an arbitrator from awarding punitive damages in a proper case.

[*P32] Next, Kraft argues that, because the Wisconsin statute dealing with punitive damages refers to the "plaintiff," the "defendant," the "judge," the "jury," and the "court," the legislature intends that only courts, and not arbitrators, may award **[***767]** punitive damages. [3] Not only is this a strained reading of the statute in question, ascribing to the legislature an intent that is not conveyed by the statute's plain language, but we also once again point out that Winkelman pursued his claim in arbitration instead of a court only because Kraft's contract so required. The contract does not limit the types of claims Winkelman can pursue in arbitration, and neither does it limit the types of relief or remedies available to him in that forum. Having thus elected, without

[3] Wisconsin Stat. § 895.85(3) provides: "The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." Section 895.85(4)(b) provides: "The judge shall submit to the jury a special verdict as to punitive damages or, if the case is tried to the court, the judge shall issue a special verdict as to punitive damages."

qualification or limitation, to bestow on an arbitrator the duties of a judge and jury, Kraft cannot now complain that the arbitrator fulfilled those duties.

[*P33] **[**358]** Kraft makes several other arguments in direct response to arguments advanced by Winkelman. Because we are not embracing Winkelman's positions on these points, we do not address Kraft's responses, with one exception. Kraft argues that, under "Winkelman's view ... some arbitrators have the power [to award punitive damages] and others do not; it just depends what each arbitrator decides. This simply cannot be the law." We reject Kraft's subtle mischaracterization of Winkelman's position, which is now also our conclusion.

[*P34] We have concluded that nothing in Wisconsin law precludes arbitrators from awarding punitive damages if the parties' agreement (or the rules they adopt under it) so permit. Some parties, however, may opt in their arbitration agreements to withhold from arbitrators the authority to award punitive damages. Thus, in that sense, some arbitrators will have the power to award punitive damages, and others will not, depending on the provisions of the parties' agreement. That is indeed the law as we have interpreted it. Moreover, although we agree with Kraft's contention that, under a given agreement, properly construed, an arbitrator either will or will not have the authority to award punitive damages, some arbitrators may conclude that they have the authority under the agreement to award punitive damages, while others may reach the opposite conclusion. A court should uphold both determinations, although one is plainly wrong, so long as neither represents a "perverse misconstruction or positive misconduct" on the part of the arbitrator. That is also the law. *See* Madison Prof'l Police Officers Ass'n, 144 Wis. 2d at 586 (citation omitted).

[*P35] **[**359]** Finally, Kraft argues that Winkelman waived the Federal Arbitration Act preemption argument that he advances on appeal because he neither made it to the arbitrator nor timely raised it in the circuit court. Because we have determined that the circuit court should not have vacated the arbitrator's award of attorney fees and punitive damages on the grounds that the arbitrator exceeded her powers, we need not address either Winkelman's federal preemption argument or Kraft's contention that it was waived. Similarly, because we are restoring the arbitrator's award of punitive damages, we do not address whether a party may seek punitive damages in circuit court after obtaining compensatory damages, but not punitive damages, from an arbitrator.

Kraft's Cross-Appeal

[*P36] We turn next to Kraft's cross-appeal. Kraft's basic premise is that the **[***768]** arbitrator's decision to award Winkelman punitive damages, and to a lesser

extent, her award of attorney fees, was so clearly violative of Wisconsin law that it shows that the arbitrator was simply out to punish Kraft, regardless of the merits of Winkelman's claim. The arbitrator's alleged animosity toward Kraft, in Kraft's view, pervades her entire decision, and thus, we must vacate all aspects of the award, including the compensatory damages that the circuit court confirmed. Lest it be said that we have overstated Kraft's argument, the following are examples of Kraft's statements regarding the arbitrator and her decision: "It is evident from the Award that the Arbitrator simply hated Kraft."; "Here is an arbitrator run amok."; and, "The only malicious act that can reasonably be gleaned from the Arbitrator's award is her irrational contempt for Kraft ....".

[*P37] **[**360]** Kraft's overheated rhetoric is unsupported by the record and detracts from the substance of its argument that the arbitrator perversely misconstrued or ignored Wisconsin law, and that she "dispensed her own brand of justice," by awarding Winkelman punitive damages and attorney fees. We note that, despite its assertions regarding the arbitrator's improper motives, Kraft does *not* assert that "there was evident partiality or corruption on the part of the arbitrator[]," one of the statutory grounds for setting aside the award. *See* Wis. Stat. § 788.10(1)(b). Moreover, Kraft acknowledges that, had the arbitrator awarded only compensatory damages, it would be hard pressed to argue that the award should be vacated, given the deferential standard for judicial review of arbitration awards. We conclude that, under the "hands off" standard for our review, which Kraft acknowledges we must employ, the arbitrator's award must be confirmed in its entirety.

[*P38] We have already noted the showings required in order for a party to obtain attorney fees under Wis. Stat. § 100.18 and punitive damages under Wis. Stat. § 895.85. We, like the circuit court, can find no basis in the record to conclude that the arbitrator did "run amok" by determining that Kraft intentionally disregarded Winkelman's rights by failing to properly train its agent and by responding defiantly to Winkelman's claim that he had been misled regarding his ability to opt out of the pricing contract for a minimal penalty. [4] Because it is not our role to decide de **[**361]** novo whether the arbitrator correctly interpreted and applied the law in resolving this dispute, we will not engage in a point-by-point

[4] Although the circuit court vacated the punitive damages and attorney fees awards because it concluded the arbitrator lacked authority to award them, the court stated that, if the arbitrator had possessed the requisite authority, it would have affirmed both awards: "Given the deference that arbitrators are accorded, in the event that I find the arbitrator has legal authority as to punitive damages and/or legal authority as to actual attorneys' fees, I have no problem whatsoever with the amounts that she awarded."

discussion of Wisconsin law regarding punitive damages. Unless we can conclude that the arbitrator was not only wrong, but that her decision evinces fraud, corruption, or bias on her part, or that she perversely construed or manifestly disregarded controlling law, we must uphold her awards. *See* Madison Prof'l Police Officers Ass'n, 144 Wis. 2d at 586. As we have stated, nothing in the arbitrator's decision, the record before us or Kraft's arguments convinces us that any of these standards have been breached.

[*P39] Kraft again emphasizes in its cross-appeal brief the fact that, in none of six other arbitrations involving claims similar **[***769]** to Winkelman's did an arbitrator award punitive damages or attorney fees, and that "one arbitrator denied any compensatory damages to the claimant, another arbitrator reduced compensatory damages by 30% and the remaining arbitrators awarded full compensatory damages." We agree with Winkelman that what other arbitrators decided to award based on other evidentiary records has no bearing on whether the arbitrator in Winkelman's case stepped outside the wide boundaries within which arbitrators are permitted to act without judicial interference. We also concur with Winkelman's observation that the fact that compensatory damages were awarded in five of the other six cases shows that this arbitrator's conclusion that Winkelman's misrepresentation claim was meritorious was not unreasonable.

[*P40] **[**362]** Finally, we note that Kraft successfully opposed a request to consolidate Winkelman's claim with the several other similar claims that apparently resulted in lesser awards. The disparate outcomes of the seven arbitrations are thus largely a consequence of Kraft's own making. An entity that includes an unlimited arbitration clause in its standard-form contracts runs the risk of having to accept disparate outcomes in the resolution of similar disputes, as well as forfeiting the opportunity for substantive judicial and appellate review of those outcomes.

[*P41] Because we conclude that all aspects of the arbitrator's decision are to be confirmed, we need not address Kraft's final argument that the circuit court erred by confirming the award in part and vacating it in part. On remand, judgment shall be entered in Winkelman's favor for all amounts awarded him in arbitration.

Attorney Fees for Court Proceedings

[*P42] Winkelman requests that we direct the circuit court on remand to determine and award him reasonable attorney fees for the proceedings in the circuit court and on appeal, which he claims were necessary in order for him to obtain from Kraft the amounts the arbitrator awarded. In support, Winkelman cites Radford v. J.J.B. Enterprises., Ltd., 163 Wis. 2d 534, 551, 472 N.W.2d 790 (Ct. App. 1991), where we held that "a party who prevails on appeal in an

intentional misrepresentation case brought under sec. 100.18 is likewise entitled to reasonable appellate attorney's fees." He points out, as well, that the Massachusetts Supreme Court, in upholding an arbitrator's award of punitive damages and attorney fees against a **[**363]** party found to have violated a statute prohibiting "unfair and deceptive acts and practices," directed that the prevailing party "may request appellate legal fees and costs" on remand. *See* Drywall Sys., Inc., v. ZVI Constr. Co., Inc., 435 Mass. 664, 761 N.E.2d 482, 484, 490 (Mass. 2002).

[*P43] In response, Kraft argues simply that our holding in *Radford* is not "broad" enough to support Winkelman's request here because the arbitrator in this case found that its agent had not intended to mislead Winkelman, and because "[t]his was a simple contract dispute involving the right of a party to cancel a contract." Although we do not embrace Kraft's arguments, we conclude that Winkelman is not entitled to attorney fees incurred during the litigation over the validity of the arbitration award.

[*P44] Unlike the plaintiff in *Radford*, Winkelman is *not* "a party who prevail[ed] on appeal *in an intentional misrepresentation case brought under sec. 100.18*." Radford, 163 Wis. 2d at 551 (emphasis added). Winkelman commenced this action under Wis. Stat. § 788.09 to confirm an arbitration award. The litigation in the circuit court and on appeal had little to do with the arbitrator's determination that Kraft's agent induced **[***770]** Winkelman to enter into the pricing contract by misrepresenting its terms. Kraft has essentially conceded that the arbitrator's decision to award Winkelman compensatory damages on his misrepresentation claim would be virtually impervious to attack on judicial review had the arbitrator not chosen to also award punitive damages and attorney fees. In short, the dispute that the parties litigated in the circuit court and this one was not whether Kraft had violated Wis. Stat. § 100.18, but whether the arbitrator had exceeded her powers or blatantly failed to follow established Wisconsin law in making the awards that she did.

[*P45] **[**364]** Thus, neither we nor the circuit court have determined whether Kraft indeed violated Wis. Stat. § 100.18; our conclusion being only that the arbitrator did not breach any of the statutory or common-law standards that would permit a court to vacate the award in whole or in part. Because neither the parties' agreement nor Wis. Stat. § 788.09 authorizes an award of attorney fees to a party who prevails in an action to confirm an arbitration award, we conclude that there is no contractual or statutory basis for us to direct that Winkelman recover from Kraft his post-arbitration attorney fees.

CONCLUSION

[*P46] For the reasons discussed above, we affirm the appealed judgment insofar as it confirms the arbitrator's award of compensatory damages and arbitration costs, but we reverse to the extent that it failed to confirm the awards of punitive damages and attorney fees. On remand, judgment shall be entered in Winkelman's favor for all amounts awarded him by the arbitrator, together with interest on those amounts to which Winkelman may be entitled, [5] and together with his allowable costs, but not actual attorney fees, incurred during this litigation. Because Winkelman has prevailed in both his appeal and Kraft's cross-appeal, he is entitled to his costs on appeal. *See* Wis. Stat. Rule 809.25(1).

By the Court.-Judgment affirmed in part; reversed in part and cause remanded with directions.

Concur by: DYKMAN (In Part)

Dissent by: DYKMAN (In Part)

Dissent

[*P47] **[**365]** DYKMAN, J. (*concurring in part; dissenting in part*). I agree with all but paragraphs 41 through 45 of the majority opinion. But because the majority's analysis of the issue of attorney fees for court proceedings contradicts the rationale it adopts to affirm the arbitrator's award of attorney fees for the arbitration, I cannot agree with its conclusion that Winkelman may not recover his attorney fees in the circuit court and here.

[*P48] I believe that the majority gets it exactly right when it concludes that the arbitrator could reasonably rely on the American Arbitration Association (AAA) rules agreed to by the parties and Wis. Stat. § 100.18(11)(b) (2003-04) [6] to award attorney fees for the arbitration *proceeding*. The majority notes:

> [The arbitrator's] authority to award the fees thus derived from the parties' contract and the rules it adopted, not directly from the statute itself. The only role the statute played was to demonstrate that Wisconsin substantive law authorizes attorney fees to be awarded when a party is induced by another's **[***771]** misrepresentations to enter into a contract.
>
> .... Here, as we have explained, the parties' contract, via the rules it adopts, permits an attorney fees award if "authorized by law." In this case, that authority is supplied by Wis. Stat. § 100.18, which in turn also satisfies the exception to the American Rule allowing fee

[5] Neither party has raised in this appeal any issue regarding whether, at what rate or from what dates interest may be awarded in the judgment on the amounts the arbitrator awarded.

[6] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> shifting if a statute provides for it."

Majority at PP17-18.

[*P49] **[**366]** This is not a surprising result. Courts have been affirming arbitration awards for many years. One can think of few areas of law with a more deferential review than an appeal of an arbitrator's award.

[*P50] But the majority changes from a deferential review to a de novo review when deciding whether attorney fees should be awarded for the court proceedings brought to confirm or set aside the arbitrator's award. Why this change? The majority's reason seems to be that the big issue in court was whether the arbitrator had exceeded her powers while the issue of Kraft's violation of Wis. Stat. § 100.18 was only peripheral.

[*P51] The portions of the majority's decision I have quoted in P2 show that the two issues are inextricably intertwined. Yet, the majority suggests that the court litigation had little to do with the arbitration litigation. The parties spent more time arbitrating Kraft's liability for damages than on its liability for attorney fees. But that is always the case in attorney fee litigation whether in court or at an arbitration proceeding. The substantive issues were factual, and necessitated witnesses. The attorney fee issue was legal and was briefed. It is no surprise that the parties may have spent more time on the factual issues than on the legal ones. But even that is open to question. Kraft claimed that the issues arbitrated were "straightforward, uncomplicated and did not require an army of lawyers, especially in view of the amount claimed."

[*P52] Ultimately, the majority concludes that because neither the parties' agreement nor Wis. Stat. § 788.09 authorizes post-arbitration attorney fees, Winkelman cannot recover them. That is a red herring. The question is not which statutes do *not* authorize post-arbitration attorney fees, but which statute does. **[**367]** The arbitrator answered that question by observing that the parties' contract provided that they would arbitrate disputes under AAA rules. She noted that AAA rules provided that she should provide a full and complete remedy if a statute permitted the award of attorney fees. She found that Wis. Stat. § 100.18 permitted the award of attorney fees in a case such as this. [7] The majority and I have concluded that this rationale permitted the arbitrator to award attorney fees for the arbitration proceeding. Why the flip-flop on

[7] Wisconsin stat. § 100.18(11)(b) provides in pertinent part:

> Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable attorney fees, except that no attorney fees may be recovered from a person licensed under ch. 452 while that person is engaged in real estate practice, as defined in s. 452.01(6).

post-arbitration attorney fees? If the parties' agreement and Wis. Stat. § 100.18(11)(b) do not distinguish between arbitration and post-arbitration fees, why should we?

[*P53] There is a logical disconnect in concluding that because more time was spent during arbitration on substantive issues than on litigating attorney fee liability, attorney fees spent appealing the attorney fee issue cannot be awarded for fees incurred **[***772]** in the circuit court and here. Had the arbitration proceeding been a circuit court trial, such a distinction would be without precedent. *See First Wisconsin Nat'l Bank v. Nicolaou*, 113 Wis. 2d 524, 539-41, 335 N.W.2d 390 (1983) (allowing attorney fees for all issues, including fees for appeal, where two of the issues were substantive and one pertained to attorney fees).

[*P54] **[**368]** There is no reason why the rule should be different for cases starting with arbitration than for cases arising in circuit court. Either way, there must be a statute or a contract which provides for fee shifting. The arbitrator concluded that the parties' contract, coupled with AAA rules and Wis. Stat. § 100.18, met that test, and awarded fees to Winkelman. Though the majority accepts the arbitrator's reasoning and permits the award of attorney fees for the arbitration proceeding, it rejects the same reasoning for circuit court and appellate fees.

[*P55] The correct answer to the attorney fee issue is that there is no liability for attorney fees in the arbitration proceeding, in the circuit court or in this court, unless a statute or the parties' contract so provides. *Milwaukee Teachers' Educ. Ass'n v. Milwaukee Board of School Directors*, 147 Wis. 2d 791, 797-98, 433 N.W.2d 669 (Ct. App. 1988). Since this is an arbitration case, the arbitrator is the fact and law finder, absent a perverse misconstruction. For me, that leaves us with two alternatives. We can conclude that the reasoning the arbitrator applied to award attorney fees necessarily applies to attorney fees in the circuit and appellate courts. Or, we can conclude that because the parties' contract is the wellspring from which liability for attorney fees arises, the arbitrator should decide whether Kraft is liable for Winkelman's circuit court and appellate attorney fees. The court chose the latter procedure as to continued testimony in *Gallagher v. Schernecker*, 60 Wis. 2d 143, 149-50, 208 N.W.2d 437 (1973), and I would do the same here. Kraft and Winkelman's contract governs the issue, and they agreed that the arbitrator would make decisions such as this one.

[*P56] **[**369]** The majority's result is unnecessary, and unfortunate for Wisconsin farmers

and others who sell commodities to organizations capable of litigating until the cows come home. Even if a contract would permit the majority's result, the advice any attorney will give to a farmer is: "Don't litigate, don't arbitrate. You can't win. Even if your contract is identical to John Winkelman's and you were deceived by the commodity purchaser, attorney fees for circuit court and appellate litigation will exceed any recovery you might obtain. Forget it."

[*P57] I would remand to the circuit court with directions to remand to the arbitrator to decide the circuit court and appellate attorney fee issue. Because I agree with much of the majority's opinion and disagree only as to its treatment of attorney fees in circuit court and on appeal, I respectfully concur in part and dissent in part.

Print

PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

TITLE IV CERTAIN WRITS AND PROCEEDINGS IN SPECIAL CASES

CHAPTER 251 UNIFORM ARBITRATION ACT FOR COMMERCIAL DISPUTES

Section 10 Costs and expenses

Section 10. Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.

Print

PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

TITLE II ACTIONS AND PROCEEDINGS THEREIN

CHAPTER 231 PLEADING AND PRACTICE

Section 6F Costs, expenses and interest for insubstantial, frivolous or bad faith claims or defenses

Section 6F. Upon motion of any party in any civil action in which a finding, verdict, decision, award, order or judgment has been made by a judge or justice or by a jury, auditor, master or other finder of fact, the court may determine, after a hearing, as a separate and distinct finding, that all or substantially all of the claims, defenses, setoffs or counterclaims, whether of a factual, legal or mixed nature, made by any party who was represented by counsel during most or all of the proceeding, were wholly insubstantial, frivolous and not advanced in good faith. The court shall include in such finding the specific facts and reasons on which the finding is based.

If such a finding is made with respect to a party's claims, the court shall award to each party against whom such claims were asserted an amount representing the reasonable counsel fees and other costs and expenses incurred in defending against such claims. If the party against whom such claims were asserted was not represented by counsel, the court shall award

to such party an amount representing his reasonable costs, expenses and effort in defending against such claims. If such a finding is made with respect to a party's defenses, setoffs or counterclaims, the court shall award to each party against whom such defenses, setoffs or counterclaims were asserted (1) interest on the unpaid portion of the monetary claim at issue in such defense, setoff or counterclaim at one hundred and fifty per cent of the rate set in section six C from the date when the claim was due to the claimant pursuant to the substantive rules of law pertaining thereto, which date shall be stated in the award, until the claim is paid in full; and (2) an amount representing the reasonable counsel fees, costs and expenses of the claimant in prosecuting his claims or in defending against those setoffs or counterclaims found to have been wholly insubstantial, frivolous and not advanced in good faith.

Apart from any award made pursuant to the preceding paragraph, if the court finds that all or substantially all of the defenses, setoffs or counterclaims to any portion of a monetary claim made by any party who was represented by counsel during most or all of the proceeding were wholly insubstantial, frivolous and not advanced in good faith, the court shall award interest to the claimant on that portion of the claim according to the provisions of the preceding paragraph.

In any award made pursuant to either of the preceding

paragraphs, the court shall specify in reasonable detail the method by which the amount of the award was computed and the calculation thereof.

No finding shall be made that any claim, defense, setoff or counterclaim was wholly insubstantial, frivolous and not advanced in good faith solely because a novel or unusual argument or principle of law was advanced in support thereof. No such finding shall be made in any action in which judgment was entered by default without an appearance having been entered by the defendant. The authority granted to a court by this section shall be in addition to, and not in limitation of, that already established by law.

If any parties to a civil action shall settle the dispute which was the subject thereof and shall file in the appropriate court documents setting forth such settlement, the court shall not make any finding or award pursuant to this section with respect to such parties. If an award had previously been made pursuant to this section, such award shall be vacated unless the parties shall agree otherwise.

In proceedings under this section in any action which has been heard by the medical malpractice tribunal established pursuant to section sixty B, the decision of the tribunal may be introduced as evidence relevant to whether a claim was

wholly insubstantial, frivolous and not advanced in good faith.

Upon receiving an inmate's complaint and affidavit of indigency, the court may, at any time, upon motion or sua sponte: (1) dismiss a claim or any action without a hearing if satisfied that the claim or action is frivolous or in bad faith; or (2) conduct a hearing presided over by the court or an appointed master, which shall be held telephonically unless the court finds that a hearing in court is necessary, to determine whether the inmate's action is frivolous and in bad faith.

If the court finds that the claim or action is frivolous or in bad faith, the court shall dismiss the claim or action but if, after hearing, the court finds that the claim is both frivolous and in bad faith in order to abuse the judicial process, the court shall, in addition to dismissing such claim or action, order that the inmate lose up to 60 days of good conduct credit earned or to be earned pursuant to section 129C or 129D of chapter 127.

If the court finds at any time that the inmate has repeatedly abused the integrity of the judicial system through frivolous filings, the court may order that the inmate be barred from filing future actions without leave of court. In determining whether a claim or action is frivolous or in bad faith, the

court may consider several factors including, but not limited to, the following:- (a) whether the claim or action has no arguable basis in law or in fact; (b) the claim or action is substantially similar to a previous claim in that it is brought by and against the same parties and in that the claim arises from the same operative facts of the previous claim.

No finding shall be made that a claim or action is frivolous or in bad faith solely because a novel or unusual argument or principle of law was advanced in support thereof.

Print

PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE I TITLE TO REAL PROPERTY

CHAPTER 183A CONDOMINIUMS

Section 17 Rebuilding following casualty loss; partition upon disapproval; repair or restoration upon approval; purchase from dissenting owner

Section 17. (a) Rebuilding of the common areas and facilities made necessary by fire or other casualty loss shall be carried out in the manner set forth in the by-law provision dealing with the necessary work of maintenance, repair and replacement, using common funds, including the proceeds of any insurance, for that purpose, provided such casualty loss does not exceed ten per cent of the value of the condominium prior to the casualty.

(b) If said casualty loss exceeds ten per cent of the value of the condominium prior to the casualty, and

(1) If seventy-five per cent of the unit owners do not agree within one hundred and twenty days after the date of the casualty to proceed with repair or restoration, the condominium, including all units, shall be subject to partition at the suit of any unit owner. Such suit shall be subject to dismissal at any time prior to entry of an order to sell if an

appropriate agreement to rebuild is filed. The net proceeds of a partition sale together with any common funds shall be divided in proportion to the unit owners' respective undivided ownership in the common areas and facilities. Upon such sale, the condominium shall be deemed removed from the provisions of this chapter.

(2) If seventy-five per cent of the unit owners agree to proceed with the necessary repair or restoration, the cost of the rebuilding of the condominium, in excess of any available common funds, including the proceeds of any insurance, shall be a common expense, provided, however, that if such excess cost exceeds ten per cent of the value of the condominium prior to the casualty, any unit owner who did not so agree may apply to the superior court of the county in which the condominium is located on such notice to the organization of unit owners as the court shall direct, for an order directing the purchase of his unit by the organization of unit owners at the fair market value thereof as approved by the court. The cost of any such purchase shall be a common expense.

CERTIFICATION OF COMPLIANCE WITH RULE 16(K) OF THE MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I, Ryan Ciporkin, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass.R.A.P. 16(a)(6) (pertinent findings or memorandum of decision);

Mass.R.A.P. 16(e) (references to the record);

Mass.R.A.P. 16(f) (reproduction of statutes, rules, regulations);

Mass.R.A.P. 16(h) (length of briefs);

Mass.R.A.P. 18 (appendix to the briefs); and

Mass.R.A.P. 20 (form of briefs, appendices, and other papers).

Dated: January 16, 2015

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